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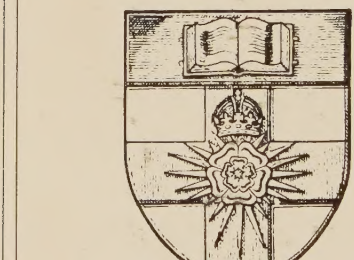

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THE

LAW REPORTS

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Supreme Court of Judicature.

CASES DETERMINED IN THE

CHANCERY DIVISION

AND IN

LUNACY,

AND ON APPEAL THEREFROM IN THE

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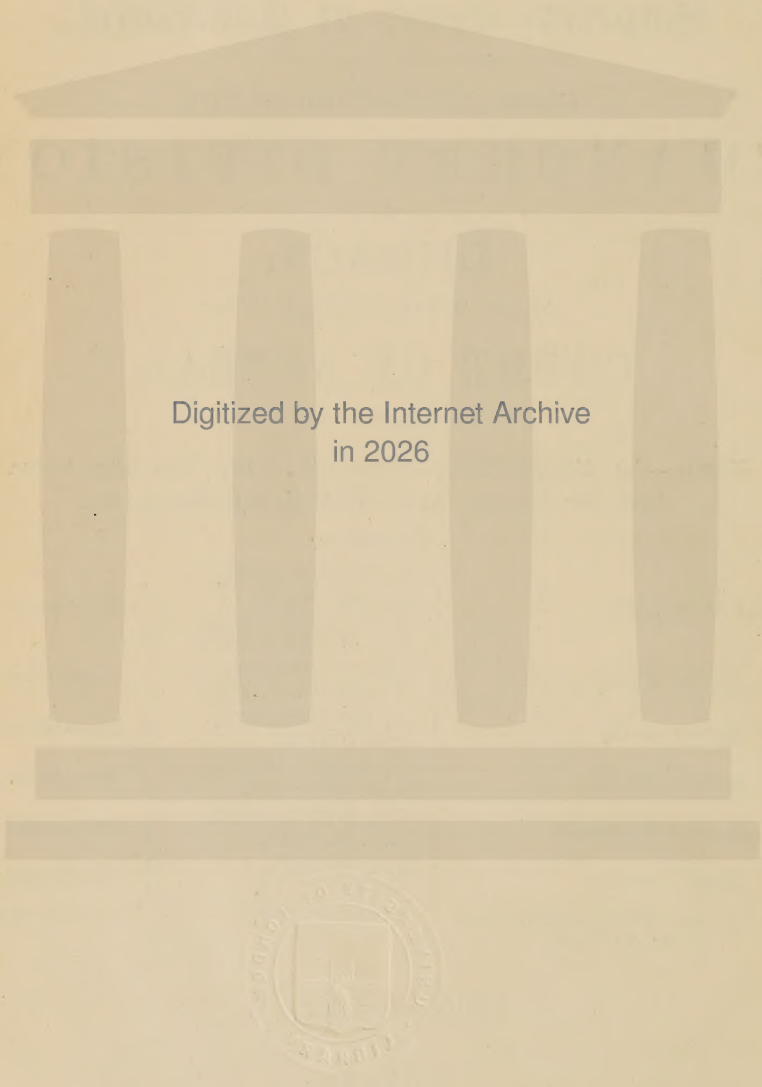
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CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

STRAPP *v.* BULL, SONS & CO.

[1892 S. 1720.]

SHAW *v.* SCHOOL BOARD OF LONDON.

[1894 S. 1698.]

C. A.
1895
March 6, 11, 12.

Company—Receiver and Manager—Right to Indemnity—Debentures—Priority.

A joint stock company for building operations, which had some uncompleted contracts, got into difficulties. An action against the company was brought by a debenture-holder, and a petition for winding up was presented by an unsecured creditor. By a consent order in the matter of the winding-up petition it was ordered that 5000*l.* should be raised by the plaintiff in the action and the unsecured creditors in order to complete the contracts, which sum was to be a first charge on the assets of the company in priority to all the debentures, that all the unsecured creditors should have second debentures given them, that two receivers and managers should be appointed, one of whom was nominated by the unsecured creditors, to carry on the business, but the company was to incur no fresh debts or liabilities. 4250*l.* was accordingly raised; but the receivers and managers in completing the contracts incurred considerable further expenses, for which they claimed to be indemnified:—

Held (reversing the decision of Vaughan Williams J.), that the receivers and managers were entitled to be indemnified out of the assets of the company in priority to the persons who advanced the 4250*l.*, as well as to the holders of debentures.

THE defendants, Bull, Sons & Co., were a joint stock company registered under the Companies Acts in 1882 as builders and

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contractors. The company issued debentures to a considerable amount, which was the first charge on the undertaking.

In the year 1891 the company entered into contracts with the School Board of London for erecting schools for sums which in the aggregate amounted to upwards of 75,000*l.* Before these contracts were completed the company got into difficulties, and on May 6, 1892, W. Strapp, who was a debenture-holder, brought the first of the above-mentioned actions on behalf of himself and the other debenture-holders for payment of their debentures. As soon as the writ was issued, Messrs. Bull and Bird were appointed receivers and managers on behalf of the debenture-holders, with liberty to raise 1000*l.* as a first charge on the assets in priority to the debentures.

On May 13, 1892, another order was made in the same action, by which Bull and Bird were empowered to raise a further sum of 4000*l.* as a first charge on the assets.

A petition was shortly afterwards presented by Messrs. Chittick and Shaw, trading as Shaw & Co., who were unsecured creditors of the company, for a winding-up order. This was opposed by the debenture-holders, and on June 1, 1892, an order was made by consent in the matter of the winding-up by which the petition was adjourned for six months, and it was ordered that the 5000*l.* directed to be raised in the debenture-holders' action and interest thereon should be a charge on all the assets in priority to all the debentures; that second debentures should be issued to the unsecured creditors of the company to the amount of their debts, and that the unsecured creditors, or some of them, should advance two-thirds of the above-mentioned sum of 5000*l.*, and that the plaintiff Strapp should advance the remaining third, as and when the same should be required for carrying on the works. And it was further ordered that, pending the adjournment of the winding-up petition, the company should contract no further debts and liabilities. No order for winding up was ever made, but the petition was ordered from time to time to stand over.

By orders in the debenture-holders' action Hobbs was appointed receiver and manager in the place of Bird to represent the unsecured creditors, and Shaw & Co. were added as defendants

to the same action. By a subsequent order Ward was substituted for Hobbs as receiver and manager.

The sum of 4250*l.* only was raised in pursuance of the consent order of June 1, 1892, of which 1750*l.* was advanced by Strapp, and 2500*l.* by unsecured creditors.

The managers and receivers carried on and completed the contracts with the School Board of London; but in order to do this they made themselves personally responsible for advances made by their bankers, to whom they gave a charge on the money due to them from the School Board on the contracts.

The debts for which the receivers and managers became in this way responsible amounted to about 7900*l.* The balance due to them from the School Board and some other debtors amounted to nearly 4600*l.*

On April 25, 1894, Shaw & Co. and some other creditors brought the above-mentioned action of *Shaw* v. *School Board of London*, claiming the money due from the School Board to the receivers and managers. The School Board took out an interpleader summons against the receivers and managers, Shaw & Co., and the plaintiff Strapp, and the action was stayed on the School Board undertaking to pay into court all moneys due from them on the contracts.

On December 13, 1894, the receivers and managers moved before Vaughan Williams J. among other things for a declaration that they were entitled to a first charge on the funds in court, and upon all moneys, funds, and properties of the defendant company in priority to the sum of 5000*l.* authorized to be raised by the order of June 1, 1892, and over the first and second debentures of the company for the balance due to them on taking their accounts as receivers and managers, and all costs properly incurred, and to an indemnity against all liabilities properly incurred by them upon contracts entered into and orders given by them as such receivers and managers.

Vaughan Williams J. refused to make the order asked for.

From this decision the receivers and managers appealed.

Farwell, Q.C., and *Upjohn*, for the appellants. The receivers and managers are entitled to an indemnity for what they have

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expended, or become liable for, in carrying on the business. There is nothing in the circumstances of this case to displace the ordinary rule. The order of June 1, 1892, was made with the consent of the unsecured creditors and for their benefit, and one of the receivers and managers was appointed to protect their interests. Therefore, they are not in the position of outside creditors; the receivers and managers are their agents as much as the agents of the debenture-holders: *Batten* v. *Wedgwood Coal and Iron Company* (1); *Burt* v. *Bull* (2); *Ex parte Izard.* (3) The clause in the consent order that provides that the company should contract no debts or liabilities was not intended to prevent the managers and receivers from incurring debts to complete the existing contracts, but to prevent them from entering into fresh contracts, and to let the public know that the company was no longer a going concern, but was winding up its business.

Bramwell Davis, Q.C., and *Peile*, for the creditors who had joined with Strapp in advancing the 4250*l.* It was not intended by the consent order of June, 1892, that any more money should be expended in completing the contracts than the 5000*l.* which was authorized to be raised; and this would have been sufficient if the receivers and managers had conducted the business more prudently. If they had a fund in their hands they might have a right to indemnity out of it, but they cannot claim an indemnity at our expense. They were agents of the first debenture-holders, and must look to them for indemnity. We were in the position of bankers advancing money for current expenses, and we claim as mortgagees of the receivers and managers.

George Lawrence, for the plaintiff Strapp.

Farwell, Q.C., in reply.

LORD HALSBURY. When the facts of this case come to be looked at, and we see the situation of the several parties, I confess it does not appear to me that there is much difficulty in deciding the only question that is now before us. It is manifest from what took place before Vaughan Williams J. that there was a sort of conference between the different parties interested in

(1) 28 Ch. D. 317. (2) [1895] 1 Q. B. 276.
(3) 23 Ch. D. 75.

this company, namely, some persons who had secured claims by debentures, and a considerable body of unsecured creditors; and it appears to have been assumed on both sides, and probably correctly, that if things went on as they were, what would happen would be that the unsecured creditors would get nothing, and the debenture-holders would get everything. At the same time, it appeared to be in the contemplation of all parties that there was a considerable amount of property which could be properly realized if the company were allowed to go on and conclude the contracts which were then in course of performance, and obtain from the School Board not only the sums of money which in pursuance of the contracts had been retained up to the completion of the contracts, but also a further profit arising from their completion; it being manifest on the other hand that if the contract was abandoned, not only would the retained moneys be forfeited in pursuance of the terms of the contracts, but all the plant and materials which the builders had provided for the purpose of the performance of the contracts were liable to be seized by the School Board, and so a great loss would be inflicted on those who were interested in the assets of the company. In this conference it is manifest to my mind that there was an agreement, not taking the form of a written contract between the parties, but of such a nature as to induce the learned judge to make an order which should represent what was the agreed state of facts and the agreed condition of things, namely, that on certain terms the 5000*l.* which had been ordered to be raised was to be brought into the concern, and the unsecured creditors were in pursuance of that arrangement to be turned into debenture-holders from having been unsecured creditors. That was the bargain, and that is the substance of the understanding at which the parties arrived. For the purpose of that bargain it was manifest that some persons or other must perform the contracts out of which the profits were to arise, and that those persons were the receivers and managers. I think it was intended, speaking generally, that the company were not to engage in any new transactions, but were only to be permitted to carry on by means of the receivers and managers the contracts into which they had already entered. All this seems

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to be properly provided for by the order made by Vaughan Williams J.

But then comes the question of the priorities. Now, I quite agree that one of the things which was intended to be done was that those who had advanced the 5000*l.* should have priority over all the debentures; but I do not concur in the idea that it ever could have been contemplated that those who were to take upon themselves the burthen of management and receivership should be left to speculate on whether or not they would ever get paid anything. It was an essential part of the arrangement that some one should manage this business, and it was necessarily implied in that arrangement that those who for the benefit of all concerned, and not merely for themselves, were entering into this arrangement, and were carrying it on to its completion, so that there should be an ultimate resulting fund capable of being divided, should themselves be indemnified for whatever they were doing, namely, carrying on these contracts; and if you look, not at each order separately by itself, but at the whole of the orders as one arrangement to which all were parties, and all tending to the same thing, it seems to me really to be free from doubt that that was the real meaning of the transaction. It is, in my opinion, hopeless to contend that the second debenture-holders, who were only brought into that position of being debenture-holders at all by this arrangement of the advance of the 5000*l.*, can be treated in two different capacities according to Mr. Bramwell Davis's argument, and that you are to look at them at one time as bankers advancing a sum of money, in which case they would be entitled to be paid their money at once without reference to what the result of the experiment might be, and, on the other hand, to look at them as second debenture-holders only, and in that capacity to be postponed to the first debenture-holders and to those who had advanced the 5000*l.*, that is to say, themselves. It seems to me that that is an impossible contention. The blot throughout the whole of the judgment, as it appears to me, is that it treats these persons entering into this arrangement as if they were independent bankers advancing money from the outside. That is not the fact. They were persons who were buying their

position as second debenture-holders by the advance of this money, and that seems to have been the theory on which the whole thing has been conducted. Under these circumstances I think that part of Vaughan Williams J.'s order is erroneous, and ought to be discharged, and that our declaration ought to be that these managers and receivers are entitled to the indemnity which they claim out of the funds.

With regard to the action against the School Board I have really a difficulty in saying anything about it, because it seems to me so manifestly wrong. The whole object of it was to withdraw the money from the receivers and managers, who, if I am right in what I have said already, were the proper persons to receive it, not from any fear that they were insolvent and that it would be lost, but upon the same grounds as have been relied on in the present appeal. Both in form and substance that action was irregular and improper, and I think the order that ought to be made in respect of that matter is that the plaintiffs in that action should be ordered to pay the costs.

LINDLEY L.J. I am of the same opinion. I cannot help thinking that such difficulty as arose in this case is attributable to an anxious desire on the part of the learned judge to make a short cut, and to do justice by orders which are more or less unusual, and perhaps in form a little irregular. Now, in order to understand the case, it is not necessary to go through the orders in detail. It will be quite sufficient to refer shortly to those which are material. [His Lordship then stated the facts of the case, which are given above, and continued:—]

That was the whole scheme, and it seems to me impossible to say that the receivers and managers were not the receivers and managers of the unsecured creditors as much as they were receivers and managers of the first debenture-holders. They were receivers and managers of everybody interested in the success of the company. If we once get to that, and if we once get the persons who advanced this 5000*l.* out of the category of strangers, having rights prior to the debenture-holders, and prior to the receivers and managers, it is obvious that the receivers and managers must be entitled to their

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indemnity, and to their costs, charges and expenses which they are primâ facie entitled to. Here it is that we differ from Vaughan Williams J. The learned judge, who had to construe these orders to which I have referred, has construed them as leaving the persons who advanced this 5000*l.* in the position of strangers. I think that that is not their true position. Of course, no one dreamt when this arrangement was made that everything would go wrong, and that there would be a deficiency of assets so serious that there is not even enough to indemnify the receivers and managers what they have expended. They did not dream of that for a moment. If they had, no one would have advanced 5000*l.* or anything. It was hoped that affairs would have turned out better; it was hoped that there would be something coming to the persons who advanced the 5000*l.* which was in the nature of salvage, and it was hoped that there would be something for the first debenture-holders and for the others. Instead of that things seem to have gone wrong. Why, I do not know. There is not enough to reimburse the receivers and managers what they have paid. Now, I cannot agree in thinking that Vaughan Williams J.'s view is correct, that on the true construction of these orders the receivers and managers are to lose everything, and are to have no indemnity at all in respect of any liabilities they may have incurred, assuming that they have incurred them properly, and that they come in respect of their indemnity after those for whose benefit they were working. It cannot be that they are to be regarded as not having anything more to do with the action than outside creditors. That is not their position at all. It appears to me that there we part company with the learned judge.

Then, as regards the School Board action. That action was a blunder and quite ridiculous, and, of course, the costs which the receivers and managers have been put to or properly incurred in respect of that action must be paid. The action has been stayed, as I understand, and the costs are to be disposed of in the present action of *Strapp* v. *Bull*. In the first place, I think it was a contempt of Court to institute it at all. There was no reason for bringing it; it was utterly unjustifiable, and the receivers and managers ought to have their costs.

The order appealed from will be discharged, and there will be a declaration that the applicants, as such receivers and managers, are entitled to a first charge upon the funds in Court to the credit of the first mentioned action, and upon all moneys, funds, and properties of the defendant company comprised in or subject to any of the debentures issued by the defendant company for the due payment of the balance which shall be found due to them on taking their accounts, as such receivers and managers, and for the costs properly incurred by them of both the above-mentioned actions, and which they shall not recover from the plaintiffs in the second mentioned action, and also for effectuating and securing to them an indemnity against all liabilities which they have properly incurred in acting as such managers as aforesaid upon contracts entered into and orders given by them or otherwise, with liberty to apply. Then the said plaintiffs in the School Board action must be ordered to pay the costs of that action so far as they have been thrown away. They must also pay the costs of the plaintiff Strapp on the interpleader summons, and on the motion to stay the action against the School Board with which he was served.

A. L. SMITH L.J. The main question in this case is whether my brother Vaughan Williams was right in ordering that the receivers and managers of Bull & Sons should be postponed to certain gentlemen who subscribed the 4250*l.* of the 5000*l.* under the circumstances which have been mentioned. Now, it seems to me that so far as the general law is applicable to the position of the receivers and managers, it is not in dispute. It is laid down in *Batten* v. *Wedgwood Coal and Iron Co.* (1), and in *Ex parte Izard* (2) by Sir George Jessel; and nobody on the one side or the other quarrels with the law which was there enunciated, that the receivers and managers are entitled to their just charges and expenses incurred in the management of the estate in which they may have been appointed receivers and managers, and they are entitled to those charges in priority to the debenture-holders and other persons holding charges on the property; but it is said in this case that the gentlemen who

(1) 28 Ch. D. 317. (2) 23 Ch. D. 75.

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have subscribed this money ought not to be called upon to pay the charges and expenses of the receivers and managers. To state it shortly, they say that they were not their managers and receivers, but were in reality the managers and receivers of the first debenture-holders, and therefore, inasmuch as Messrs. Bull and Bird, the managers and receivers, were not the managers and receivers of Chittick & Shaw, and the others who had advanced the 4250*l.*, they by the order in June had a priority over all debentures, and that therefore they ought to come in first, and not pay the charges of the receivers and managers. Now, that is the point that is in dispute. How was it that the receivers and managers came into connection with Messrs. Chittick & Shaw at all? It is true that there had been a debenture-holders' action, and there had been also in May, 1892, a petition presented to wind up the company. Now, when that came before Vaughan Williams J., if things went on as they were, the debenture-holders would eat up all the assets of the company, and the unsecured creditors of the company would get nothing at all. Vaughan Williams J., with the consent of the parties, on June 1, 1892, intervened with a view of making an order by which, if possible, the unsecured creditors might get something out of this, so that the whole of the assets of this company should not be absorbed by the debenture-holders, and so that they should not get everything. There were three contracts outstanding between Bull & Sons and the School Board for London, and it was estimated that if those contracts were worked out to a conclusion there would be large profits emanating therefrom. There was an estimate made of them. There were some moneys retained which had become due, and which were becoming due as the works progressed and as time went on. It was estimated that if all went well, and these contracts were completed, a profit of some 20,000*l.* would be made. That was an estimate. Without working off those contracts and ending those contracts, none of those assets, that is the 20,000*l.*, would be realizable at all; and on the other hand, if those contracts were not carried out, the School Board, under the provisions of their contracts, could declare a forfeiture and take possession of the plant and prevent the contracts being completed. It was necessary that there should be some ready

money provided to go on with those contracts. I have no doubt it was thought that if 5000*l.* would be subscribed by the unsecured creditors who were going to get a benefit under this consent order, then this asset would be realized for the firm of Joseph Bull & Sons. Then there arose this question: What benefit was it to the unsecured creditors to pay that 5000*l.* out of their pockets in presenti? And the consideration which also was given to the unsecured creditors was that they should become second debenture-holders, so as to rank after the first debenture-holders, although it is perfectly true that the 5000*l.* which they then had advanced out of their own means to the receivers and managers of Joseph Bull & Sons was ordered to be a first charge in priority to any of the debentures. I have to ask myself this question: How were these contracts to be carried on? There were two receivers and managers appointed. It is said that the object of the persons who were advancing these moneys and who were becoming second debenture-holders was that these receivers were not to be paid a single shilling of money, but that they were to be paid by the first debenture-holders. How does that appear on the orders and on the facts of this case? [His Lordship then referred to some of the evidence in the case, and continued:—] Under these circumstances it seems to me that these people who have advanced the money stand in the same position as second debenture-holders. They have acquiesced in this form of carrying on the business by their receivers and managers, and I think, therefore, the law as laid down by Pearson J. and the Master of the Rolls, Sir George Jessel, in the two cases to which I have referred, applies, and consequently they are entitled to be paid their charges.

As far as regards the action between Chittick & Shaw and the School Board, that action ought never to have been brought at all.

Solicitors: *Ward, Perks & McKay; Witham, Roskell, Munster & Weld; West, King, Adams & Co.*

M. W.

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1895
March 19.

In re GREHAN (A LUNATIC).

Lunatic—Practice—Inquisition in England—Property in Ireland—Percentage on Annual Income—Sum for Maintenance remitted to England—Percentage payable to English Court of Lunacy—Lunacy Regulation (Ireland) Act, 1871 (34 & 35 *Vict. c.* 22), *ss.* 109, 114—*Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *ss.* 148, 149—*Lunacy Act*, 1891 (54 & 55 *Vict. c.* 65), *s.* 27, *sub-s.* 3—*Rules in Lunacy*, 1892, *r.* 126.

A lunatic was so found by inquisition in England and the record transmitted to Ireland, where all her property was situate; and a sum was remitted from Ireland to her committee in England for her maintenance. A percentage on her clear annual income was paid to the Court of Lunacy in Ireland:—

Held (A. L. Smith L.J. dissenting), that the Court of Lunacy in England was not entitled to a similar percentage on the sum remitted to England for the lunatic's maintenance.

MARY FRANCES GREHAN, a widow resident in England, was found lunatic by inquisition in England, and committees of her person and estate were appointed.

A transcript of the record of the inquisition was transmitted to Ireland and entered of record in the Chancery of Ireland; and a committee of the lunatic's estate was appointed by the Lord Chancellor of Ireland. The whole of the property of the lunatic consisted of stock in the Bank of Ireland and money invested on mortgage of land in Ireland. The clear annual income amounted to about 1120*l.*, and a percentage of 4 per cent. on that sum was paid to the Irish Chancery under the provisions of the Lunacy Regulation (Ireland) Act, 1871, s. 109. A yearly sum of 1065*l.* was allowed by the Court of Lunacy in England for the maintenance of the lunatic, and an order was made by the Lord Chancellor of Ireland under which the sum of 1065*l.* was remitted to the committee of the estate in England to be applied for her benefit.

The officers of the Court of Lunacy in England claimed a percentage of 4 per cent. on the sum so remitted to England. A summons was accordingly taken out before the Master in Lunacy by the committee of the estate in England asking for a declaration that, having regard to the payment of the percentage in

Ireland, no percentage was payable in England upon the amount remitted to the committee in England for the maintenance of the lunatic.

The Master held that the percentage ought to be paid, and the committee appealed to the Court of Lunacy.

Vernon Smith, Q.C., and *Stewart-Smith*, for the appellant. The question depends upon the interpretation of the sections in the Lunacy Regulation (Ireland) Act, 1871 (34 & 35 Vict. c. 22), and the Lunacy Act, 1890 (53 & 54 Vict. c. 5), which relate to the percentage payable on the administration of lunatics' estates (1), and the 126th rule of the Rules in Lunacy, 1892.

(1) The sections specially referred to in the argument were the following:—

34 & 35 Vict. c. 22, s. 109: "And whereas it would greatly facilitate and simplify the practice in Lunacy and would be attended with convenience that the charges incident to the Lunacy Office and the administration of the estates of lunatics should be defrayed, except as hereinafter mentioned, by means of a percentage graduated in an equitable manner as between richer and poorer estates in part: Be it enacted as follows:—A percentage on the respective clear annual incomes of all lunatics shall be paid according to the several rates following; that is to say . . . (3) The rate of four pounds per centum for each annual income amounting to 1000*l.* or upwards, but so that no larger sum be payable in such case in any one year than 150*l.*"

Sect. 114: "All the foregoing provisions respecting fees and percentage shall be applicable to the proceedings in the matter of and to the property of a lunatic under the protection of the Lord Chancellor intrusted as aforesaid, by virtue of proceedings taken under the provisions of this Act relative to the protection of persons of weak mind, and also to the proceedings in the matter of and to the property of a lunatic under the protection of the Lord Chancellor intrusted as aforesaid by virtue of the transmission of the record of an inquisition from England, and its entry of record in the Chancery of Ireland, and also to the proceedings in the matter of and to the property of a person residing out of Ireland, and declared idiot, lunatic, or of unsound mind, according to the laws of the place where he is residing, where the Lord Chancellor intrusted as aforesaid makes an order affecting the stock or any portion of the capital stock or shares of such person as last aforesaid or dividends thereof; and the aforesaid provisions shall be applied to the several classes of cases mentioned in this present section in such manner and under such regulations as the Lord Chancellor shall from time to time order, but so that no percentage be levied or paid in either of the two last-mentioned cases, except in respect of income arising from property being within the jurisdiction of the Lord Chancellor intrusted as aforesaid, and being administered by him or under his authority and direction."

53 & 54 Vict. c. 5, s. 148, gives

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By s. 109 the Irish Chancery is empowered to take a percentage of 4 per cent. on the clear annual income of lunatics amounting to 1000*l.* or upwards; but by s. 114 it can only levy that percentage in the case of lunatics who have been found lunatic in England and the record of the inquisition transmitted to Ireland out of property situate in Ireland. And by rule 126 of the Rules in Lunacy of 1892, made under the authority of the Lunacy Acts of 1890 and 1891, the Court of Lunacy in England may take a percentage of 4 per cent. on clear incomes of lunatics of the same amount; but by s. 27, sub-s. 3, of the Lunacy Act, 1891, that percentage is confined in

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power to the Lord Chancellor, with the concurrence of the Treasury, to make rules fixing the percentage and fees payable in proceedings relating to lunatics and their estates.

Sect. 149: "The provisions of this Act as to percentage and fees shall extend—

* * * *

"(*c.*) To lunatics under the protection of the judge in Lunacy by virtue of the transmission of the record of an inquisition from Ireland, and its entry of record in the High Court.

"(*d.*) To persons residing out of England, and declared lunatic according to the laws of their place of residence, where the judge in Lunacy makes an order affecting the property of such persons or any part thereof.

"Provided that in the two last-mentioned cases no percentage shall be levied except in respect of income arising from property within the jurisdiction of the judge in Lunacy, and administered under his direction."

54 & 55 Vict. c. 65, s. 27: "(3.) The power conferred by s. 148 of the principal Act (53 & 54 Vict. c. 5) to make rules fixing percentage and fees shall be deemed to extend to all proceedings under the principal Act or this Act, whether relating to lunatics so found by inquisition or to any other person in relation to whom or to whose property an order under the said Acts has been or may be made. Provided that in the case of lunatics under the protection of the judge in Lunacy by virtue of the transmission of the record of an inquisition from Ireland and its entry of record in the High Court, and in the case of persons residing out of England and declared lunatic according to the laws of their place of residence, no percentage shall be levied except upon income arising from property within the jurisdiction of the judge in Lunacy and administered under his direction."

Rule 126 of the Rules of 1892, made under the Acts of 1890 and 1891, is as follows: "There shall be paid a percentage at the rate of 4 per cent. per annum on the clear annual income, amounting to 100*l.* and upwards, of every lunatic so found by inquisition, but so that no larger sum shall be payable in any case in any one year than 400*l.*"

the case of lunatics found lunatic in Ireland and the record transmitted to England to income arising from property situate in England. There is in none of the Acts a proviso which meets a case like the present, for here the lunatic has been found lunatic in England, and the percentage is claimed by the Court of Lunacy in England on income from property which is situate in Ireland. But we contend that the intention of the Acts is clear that the percentage should only be paid in any case on property situate in the country where the estate is being administered, and should not be paid in both countries. Here all the property is in Ireland and the estate is being administered there, and the sum on which a percentage is now claimed is not the clear income of the lunatic, but a sum sent over to this country for a specific purpose.

Ingle Joyce, for the Attorney-General. The validity of the order for payment of a percentage in Ireland cannot be questioned in this Court: *In re Talbot.* (1) The 126th rule, which has the authority of an Act of Parliament, is explicit in giving the right to the Court of Lunacy in England to take a percentage on the clear income of the estates of all persons found lunatic in England. The estate is being administered in England as well as in Ireland, and orders are made in the Court here; therefore it is not unreasonable that a percentage should be paid here. The fact that a special proviso is made that no percentage shall be paid in England on the Irish property of Irish lunatics, nor in Ireland on the English property of English lunatics, shews that the legislature had in their mind the possibility of a double percentage being claimed, and raises no presumption that they intended to except sums remitted from Ireland for the maintenance of a lunatic in England, as in the present case. In a case of hardship the committee may petition the Treasury to remit the amount.

LORD HALSBURY. I confess I have had very great difficulty in construing these different sections. Of course, on the surface one would say that the Acts had been passed without sufficiently considering the converse cases of those that actually have been

(1) 20 Ch. D. 269.

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provided for; but I doubt if that is the proper mode of construing an Act of Parliament.

The ground upon which I should proceed is this. I find, taking the two sets of enactments together, that the real substantial provision is that within certain limits the payment should be made to the Lunacy Office by some percentage in respect of the work done there. In the present case the Lord Chancellor in England has, by the proceedings in this country, obtained the control and disposition of the lunatic's property, her person being in England and the property situate in Ireland. When the property is in Ireland there is an Act of Parliament dealing with the property there, and giving the Lord Chancellor power to administer the produce of that property. Now, speaking generally, without coming for the moment to the particular difficulty that arises here, the administration has to be paid for by a sum of 4 per cent.—the annual income being over 1000*l.*—and the Lord Chancellor of Ireland has accordingly made an order for payment of maintenance. When I say he has made an order, I agree that on the construction of the two Acts put together the Lord Chancellor of Ireland adopts what has been done in England as the order for maintenance, and sends over to this country for the maintenance of the lunatic in England the amount of maintenance which had been already ascertained in England, and which the Lord Chancellor in Ireland adopts as the basis of the order that he makes, and remits the amount, impressed with the necessity of maintaining the lunatic. That is the administration of the whole estate of the lunatic which is situate in Ireland. Then I find that a rule in England has made subject to the same percentage of 4 per cent. the clear annual income of the lunatic. There are two or three possible constructions of that. Does it mean the whole annual income of the lunatic in England, in which case the 4 per cent. would be charged in England again, although the whole estate had been chargeable in Ireland? Or does it mean that you must assume it is but one administration, although operated upon by two equal authorities both in England and Ireland? If so, the sum which is transmitted from Ireland to England is a sum which is not the clear annual income of the lunatic, but is a sum

specially devoted by the order to his maintenance, and with respect to which no power of charging it is given, because the only power of charging is the power of charging the whole clear annual income. I confess, looking at the policy of the Act, and what it is to my mind apparent was intended to be the charging power, I have come to the conclusion, although with some difficulty and hesitation, that the rule which is to be treated as an Act of Parliament justifies us in saying that the "clear annual income" is that which has already been taxed in Ireland and paid 4 per cent., and that therefore there is no obligation to pay the 4 per cent. again in England upon that which is not the clear annual income of the lunatic in any sense, but is a part of that clear annual income which has been transmitted from Ireland charged with the performance of a particular duty.

I say I have come to this conclusion with some difficulty, and the principal difficulty in my mind is that the possibility of two sets of charges being made seems to have been in the mind of the legislature, and they appear to have provided for some cases, and prevented the double charge being made; but they have not provided for this case. Nevertheless, looking at the language of the rule, which is equivalent to an Act of Parliament, looking at the policy of the Act, and to the machinery which is interchangeable between the English and the Irish Chancellors, I think I am justified in coming to the conclusion that only one percentage is chargeable.

LINDLEY L.J. I think this case is one of difficulty. It turns upon the true construction of three Acts of Parliament passed by the Parliament of the United Kingdom, one of them relating to Ireland, and two of them relating to England. The real question is what is the true construction of the expression "clear annual income" in the rule 126, having regard to the machinery provided by those three Acts of Parliament relating to lunatics. There are the sections which have been referred to, ss. 109 and 114, of what is called the Irish Act of 1871, but is really a United Kingdom statute applicable to Ireland, and ss. 107 and 148 of the Lunacy Act, 1890, and s. 27 of the Lunacy Act, 1891. It is obvious that wherever Parliament

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foresaw there was a possibility of taxing the same property of lunatics subject to the jurisdiction of England and Ireland twice over, they provided that it should not be done. That is obvious. But this is a case which was not apparently foreseen. Now we are asked to say that, because it has been left out, two percentages have to be deducted, one in Ireland and one here. I think that would be contrary to the true construction of the three Acts of Parliament. That is the view I have arrived at, not without some doubt. We are not dealing with a case of money remitted from Paris or a colony or any place not governed by these three Acts of Parliament. We have to construe these three Acts of Parliament together and make them work if we can, and it seems to me it would be contrary to the true construction of the Acts if we held that rule 126 authorizes the masters or the proper authority in England to levy a percentage of 4 per cent. on a portion of the clear annual income already charged under one of the three Acts of Parliament with 4 per cent. in another country. In other words, I do not think the words "clear annual income" in rule 126 apply to a sum remitted by the Irish authorities to England to be applied by the committee here. I think there may be a little difficulty in it; but the difficulty on the other side is very formidable. The difficulty on the other side is that we should have to say that there is a transparent blot, and a blot so difficult to get over that we are compelled to say two charges ought to be made when it is quite obvious that Parliament never intended to allow that. The proper construction of these Acts and Rules is that the clear annual income which is sought to be made the subject of the charge of 4 per cent. in England, having paid that 4 per cent. once in another country under an English Act of Parliament, ought not to be charged with another 4 per cent. here. I think that is the true view, and I think it is sounder on the whole than to say that the Treasury ought to put the matter right by remitting the amount.

A. L. SMITH L.J. I am sorry to say I cannot go so far as Lord Halsbury and Lindley L.J. have gone in the construction of these Acts and Rules. Two questions arise here. The first

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is, Can the 4 per cent. be charged on this sum of money (call it 1000*l.*) in Ireland? And the second is, Can it be charged with another 4 per cent. in England? Those two questions are the questions that have to be decided here. The transcript of the record having been sent from England to Ireland, the lunatic having been found lunatic by inquisition in England, I have no doubt under s. 114 of the Lunacy Regulation (Ireland) Act, 1871, that the 4 per cent. can be charged there. I have no difficulty in determining that. I do not think there can be any substantial doubt about it.

But now comes the other question, namely, whether this 1000*l.*, having paid the 4 per cent. in Ireland and being transmitted here to England for the maintenance of the lunatic, is within the taxing provision of the Act relating to lunatics in this country. I wish to point out that my brethren have come to the conclusion that, apart from the rule which I will deal with in a moment, there would not be the exemption of 4 per cent. in this country, or in other words, that 4 per cent. would be payable on this 1000*l.* when it came here. That is, as I say, apart from the rule. Taking the Lunacy Act of 1890, ss. 148, 149, it appears to me to be manifest that in the case of a lunatic found lunatic by inquisition in this country the 4 per cent. is to be levied on the 1000*l.* if it was received by his committee in this country, and the proviso which will be found at the end of s. 149, when read with sub-ss. (*a*) and (*c*) of s. 149, runs thus: "4 per cent. is payable on the property of a lunatic found by inquisition in this country, except in a case of transmission of the record from Ireland to this country, in which case the 4 per cent. is not to be paid here." Now, there is no co-relative sub-section to this section exempting 4 per cent. in the case of a record of the inquisition being sent from England to Ireland as in this case; and although I perfectly agree with Lord Halsbury and Lindley L.J. as to what I surmise to be the policy of the legislature, I must say it does seem to me that a blot has been hit, and I do not feel inclined, nor can I bring myself, to heal a blot by stretching language and giving to it a construction which I do not think it reasonably bears. So much for the Act of Parliament; and if this case had rested there, it appears

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to me this point would be absolutely unarguable. I pass over the Act of 1891, because it does not in any way advance the point that arises under the Act of 1890.

Now we come to the rule. What is the meaning of this rule? The Lord Chancellor may make rules under the Act of 1890 and the Act of 1891. It is a rule applicable to a lunatic found lunatic in this country, and to his property in this country. It says, "There shall be paid a percentage at the rate of 4 per cent. per annum on the clear annual income." I will read in "of such lunatic." What does it matter where his income comes from, whether from Paris, Australia, or Egypt? The 4 per cent. is charged when the income is in this country of the lunatic so found in this country. It seems to me that this 1000*l.*, although it has been taxed, and properly taxed, with this 4 per cent. percentage in Ireland, when it comes here, although it has paid that sum, is the clear annual income of the lunatic in this country, though by an order of the Lord Chancellor it has been allocated to the maintenance of the lunatic whilst he remains a lunatic in this country. This is the difficulty I have. I cannot myself say this 1000*l.* was not the clear annual income of the lunatic when it came to this country simply because it has had to pay 4 per cent. under the Irish Act in Ireland before it came here any more than if there had been any other tax peculiar to Ireland which would have fallen upon this income. It could not make it any the less, as it seems to me, clear annual income when it comes here because it has paid a tax that has been imposed on it in the country out of which it happens to arise. That is the difficulty I have. I think the blot does exist, and that as the law now stands this 4 per cent. is payable on this 1000*l.* in this country.

LORD HALSBURY. We are all agreed that if the rule cannot be construed as the majority of the Court think it ought to be construed, it is very desirable that the rule should be altered.

Solicitors: *Palmer, Eland & Nettleship; Hare & Co.*

M. W.

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EDWARDS *v.* BROWN.

[1893 C. 1578.]

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March 23.
C. A.
March 25.

Practice—Service out of Jurisdiction—Originating Summons—Order—Notice—Jurisdiction—Rules of the Supreme Court, 1883, *Order* XI.; *Order* XVI., *r.* 40; *Rules of the Supreme Court, November* 28, 1893, *r.* 7; *Rule of the Supreme Court, January* 10, 1894.

The Court cannot give leave to serve notice of an order made on an originating summons upon a person resident out of the jurisdiction. But in such a case the person having the conduct of the proceedings may of his own motion give notice, by letter or otherwise, to the person resident out of the jurisdiction; and if, after notice, that person does not choose to come in, the Court will act upon the order, and, where a fund in Court is in question, will distribute it, in his absence.

Decision of North J. affirmed.

In re Gordon's Settlement Trusts (W. N. (1887) 192) doubted.

SUMMONS by the plaintiff, asking that she might be at liberty to serve notice of an order made in the action upon December 11, 1893, upon William Cliff, a brother of the testator, at St. Quentin, in France.

The action was commenced on May 12, 1893, by originating summons, for the purpose of having certain questions which had arisen in the administration of the estate of Edwin Cliff, deceased, determined by the Court.

On December 11, 1893, an order was made upon the summons, by which it was declared "that the domicil of the testator Edwin Cliff was, at the date of his will, and thenceforward down to the date of his death, in France, and that, according to the law of France, upon the death subsequent to that of the testator of the testator's sister Anne Drewry, in his will mentioned, and without having ever had any issue, the one-fourth of the four-sevenths of the testator's residuary real and personal estate, by the said will devised and bequeathed in trust for the said Anne Drewry for life, is undisposed of by the said will, and passes in equal shares to the next of kin (héritiers naturels) of the testator, according to

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the law of France, at the time of his death, and that, according to the law of France, any of the testator's next of kin who may claim to be entitled to any share or interest in the said share of the testator's residuary real and personal estate not disposed of by his said will must bring into hotchpot any estate or interest in the testator's estate devised or bequeathed by his said will to or in trust for them." And inquiries were directed (1.) "Who, having regard to the above declarations, were, according to the law of France, the next of kin of the testator at the time of his death?" and (2.) "Who are the persons now entitled to the said one-fourth of four-sevenths of the testator's residuary real and personal estate, and for what estates and interests, and in what shares and proportions?"

Some years before the originating summons was taken out a petition under the Trustee Act, for the appointment of new trustees of the four-sevenths of the testator's residuary estate, had been presented, on which an order appointing new trustees had been made, and by this order the trustees were directed to transfer the four-sevenths into court. This was done; but the fund was transferred into court in the matter of the petition, and, there being no jurisdiction under the Trustee Act to direct inquiries to ascertain the persons entitled to the fund, this originating summons was taken out for that purpose, as regarded the share of which Anne Drewry had been tenant for life, and which had been carried over to a separate account. It was intended, when the inquiries should have been answered, to present another petition for the distribution of the fund. In the course of the prosecution of the inquiries in chambers it appeared that William Cliff, a brother of the testator, who was one of his next of kin according to the law of France, was resident in France. He was not a party to the action.

A summons was then taken out by the plaintiff, asking for leave to serve notice of the order of December 11, 1893, upon William Cliff, in France, the object being to bind him by that order under the provisions of Order XVI., r. 40.

This summons was heard by North J. in chambers.

H. Terrell, for the plaintiff.

March 23. NORTH J. read the following judgment in court. This case was argued before me in chambers; but, as Mr. Terrell desires to take the opinion of the Court of Appeal, I think it better to put into writing and state in court my reasons for the conclusion at which I have arrived.

The action was commenced by originating summons, and the Court has declared that part of the property of a testator goes to his next of kin, according to the law of France, and has directed certain inquiries to ascertain who are such next of kin, and who are now entitled to their shares.

In prosecuting the inquiries it transpired that a person residing in France, not a party to the proceedings, is interested therein, and I agree with the applicant that this person ought to have some information as to what is being done. Indeed, I might possibly decline to divide the fund until such information had been conveyed to him; and the party having the conduct of the proceedings ought to give him such notice forthwith. He can do this without any leave from the Court. But I am now pressed to give such leave in order to bring the case within Order XVI., r. 40. [His Lordship read the rule, and continued:—]

As the person in question is out of the jurisdiction, I have no power to give leave to serve any such notice upon him. It is now quite settled that, apart from the authority of a statute (or of rules authorized by statute), the Court has no jurisdiction to give leave to effect service of process abroad; that Order XI. is, since the orders of 1883 came into force, a complete code on the subject of service out of the jurisdiction, superseding the previous practice (see *In re Eager* (1), *In re Busfield* (2)), and that such service can only be allowed either when the process is within the precise language of Order XI., or is by the rules directed to be served "according to the rules relating to the service of writs of summons," as in the case of a third party notice, under Order XVI., r. 48, or a counter-claim, under Order XXI., r. 12. Accordingly, it was held in *In re Busfield* (2) that leave could not be given to serve an originating summons out of the jurisdiction, and, if there is no jurisdiction to allow service of such a summons abroad, I do not see how leave to serve proceedings in an action commenced by such a summons can be given either.

(1) 22 Ch. D. 86. (2) 32 Ch. D. 123.

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In *In re Gordon's Settlement Trusts* (1), Chitty J., following a decision of Kay J., gave leave to serve out of the jurisdiction a petition for payment out of court of funds paid in under the Trustee Relief Act, pointing out that the effect was merely to intimate to the parties served that there was a fund in court in which they might be interested, and to give them proper notice in order that they might be present at the hearing of the petition, but not for the purpose of exercising any jurisdiction over them. As to the propriety of giving such a notice, I entirely agree, and a very convenient mode of giving it is by handing to the party a copy of the petition; but this is a very different thing from serving him with process by delivery of an order indorsed with a notice (following Order XVI., r. 40), that he will be bound by the proceedings as if he had originally been made a party, which *In re Busfield* (2) decides could not have been done in such a case as the present. Respectfully differing from the view that leave to serve even such a petition abroad could be given by the Court, I, in *In re Jellard* (3), also a case under the Trustee Relief Act, declined to follow *In re Gordon's Settlement Trusts* (1) in that respect, intimating that the parties could give notice without leave, if they pleased, but that I could not fortify such a proceeding by giving leave to serve the petition abroad. On appeal from that refusal, the Court of Appeal did not express any dissent from my view. But it appeared that the funds belonged to Mr. Jellard and his three children, who had joined in a petition under the Act, by the order on which the funds had been carried to separate accounts, with directions for payment of income, and the petition before the Court was by the assignee of the income and part of the capital, seeking for payment to him. The Jellards then being in Australia, the Court held that, as this petition did not seek to originate any jurisdiction against them, for they had submitted to the jurisdiction by their own petition, and the petition before the Court only sought to give full effect to an order which they had themselves obtained, it could be served on the solicitors in this country who represented them on the first petition, and whose names appeared on the record. The Court did not decide that leave so to serve the

(1) W. N. (1887) 192. (2) 32 Ch. D. 123.
(3) 39 Ch. D. 424.

solicitors was necessary, though, to prevent all difficulty, it gave leave; but this service, it will be noted, was not out of the jurisdiction. I am not aware of any case of more recent date in which leave to serve such a petition abroad has been given by the Court. In *In re Stanway's Trusts* (1) Kekewich J. refused to give such leave.

In proceedings under the Patents, Designs, and Trade Marks Acts, it seems quite settled that a petition cannot be served out of the jurisdiction, but that, if the party who would have been served, if he had been within the jurisdiction, has notice of what is going on, and does not think fit to come in and contest the case, it can and will be disposed of in his absence, and that the notice given does not require any leave of the Court, which has no jurisdiction to give such leave: *In re Drummond's Patent* (2); *In re La Compagnie Générale* (3); *In re King & Co.'s Trade-mark.* (4) I do not say that the procedure under those Acts is governed by the General Orders and Rules of the High Court, but those cases recognise the fact that the Court cannot give leave to effect service abroad, except so far as it is authorized by statute.

Again, under the Companies Acts, it has been held that the Court has no jurisdiction to give leave to serve orders, notices, &c., upon persons resident out of the jurisdiction: *In re Anglo-African Steamship Co.* (5) In *In re Nathan, Newman & Co.* (6) an official liquidator had issued and sent by post, under the Winding-up Rules and Orders, notices in writing of the day fixed to settle a list of contributories, and that the persons to whom the notices were sent were included in the list. Some of these letters had been sent to persons out of the jurisdiction. No leave had been given by the Court to issue, send, or serve such notices. It was held by the Court of Appeal (contrary to the view I had taken) that such communications were mere warnings of what was going on, and might be given anywhere without leave, and even to foreigners residing abroad who happened to be shareholders; and Cotton L.J. said: "Service of a notice of that

(1) W. N. (1892) 11.
(2) 43 Ch. D. 80.
(3) [1891] 3 Ch. 451.
(4) [1892] 2 Ch. 462.
(5) 32 Ch. D. 348.
(6) 35 Ch. D. 1, 3.

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kind is a very different thing from service of an originating summons or of a notice intended to be the foundation of proceedings substituted for an action. It is merely a notice that they will be placed on the list unless they shew cause to the contrary."

Little practical difficulty arises from the absence of interested persons abroad; when they have had notice they generally appear. If they do not, the Court can dispense with service upon them, and will feel no difficulty in doing so where a man with full information of what is going on stands aloof and will not come in. In the present case I should not, under such circumstances, feel the slightest hesitation in dispensing with service of the order under Order LV., r. 35, though I could not order substituted service in the absence of evidence that the party had gone abroad to avoid service: see *Fry* v. *Moore* (1); *Wilding* v. *Bean.* (2)

The embarrassment which does sometimes exist was deemed worthy of a solution by statutory rule, and, accordingly, rule 7 of the rules of November 28, 1893, provided that Order XVI., r. 40, should be so amended as to authorize service of notice of a judgment or order upon any person interested "whether within or without the jurisdiction"; but unfortunately this was undone by the subsequent rule of January 10, 1894, annulling the amendment to which I have just referred, and for the present the remedy has been abandoned, and the former defective proceeding has been restored. I cannot ignore the fact that, first, such legislation was considered to be requisite in order to warrant service abroad; and, secondly, that it was subsequently held that such legislation as to service abroad was not desirable, and the provision authorizing it was promptly recalled.

I was asked to give leave in the present case because, if it was stretching a point, it could do no harm. But, in my opinion, leave ought not to be given when the giving it confers no advantage and does not enable a party to do what without such leave he could not do. As Cotton L.J. said in *In re Anglo-African Steamship Co.* (3): "This is not a question of practice but

(1) 23 Q. B. D. 395. (2) [1891] 1 Q. B. 100.
(3) 32 Ch. D. 350.

of jurisdiction—whether this Court has the power to serve notices of an order on persons resident abroad, so that the order may be enforced against them when they come to this country. It is said that the leave may be given saving all rights of the persons served. But if what is done is wrong, in my opinion the Court ought not to do it, leaving the person served to take an objection which the Court ought itself to have taken."

W. L. C.

The plaintiff appealed ex parte.

The appeal was heard on March 25, 1895. C. A.

H. Terrell, for the appellant. I submit that leave should be given to serve William Cliff, in France, with notice of the order of December 11, 1893, under R. S. C. 1883, Order XVI., r. 40, which provides that the Court may, in an administration action in which a judgment or order has been pronounced, direct that any persons interested shall be served with notice of the judgment or order, such persons, after such notice, being bound by the proceedings. R. S. C., 1883, Order XI., as to service out of the jurisdiction, applies only to a writ of summons, or notice of a writ of summons, and not to an originating summons or to any order on an originating summons. By R. S. C., November 28, 1893 (1), Order XI. was extended to an originating summons, and Order XVI., r. 40, was amended so as to allow service of notice of an administration judgment or order out of the jurisdiction. But by R. S. C., January 10, 1894 (2), these amendments were annulled, so that the rules are now restored to the form in which they stood before the amendments of 1893; that is to say, Order XI. is still limited to a writ of summons, or a notice of a writ of summons, and the question remains whether, according to the practice of the Court, notice of proceedings other than a writ of summons may be served out of the jurisdiction. The cases are divided into two classes: first, cases where the notice sought to be served abroad is intended to be the foundation of subsequent proceedings, the object of which is to render the person served subject to some liability; and, secondly, cases

(1) W. N. 1893 (Appx.), p. 5.

(2) W. N. 1894 (Appx.), p. 1; Annual Practice, 1895, vol. ii. p. 432.

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where the notice sought to be so served is of proceedings that have been already commenced, and the object is to bind the person out of the jurisdiction. In the latter case service abroad has been allowed both before and since the rules of 1883 in various instances, such as an interpleader summons—*Credits Gerundeuse* v. *Van Weede* (1), following Lord Eldon's decision in *Stevenson* v. *Anderson* (2)—and petitions under the Trustee Relief Act: *In re Bonelli's Electric Telegraph Co.* (3); *In re Haney's Trusts.* (4) Notice of the settlement of a list of contributories in a winding-up, and a third party notice for contribution, are other examples of the second class of cases. [He also referred to *Re Naylor's Residuary Personal Estate.* (5)]

LINDLEY L.J. In my opinion North J. was quite right in refusing to give the plaintiff leave to serve the order of December 11, 1893, out of the jurisdiction. The principle is stated by Cotton L.J. in *In re Nathan, Newman & Co.* (6), where he says that although you cannot serve, out of the jurisdiction, an originating summons or a notice intended to be the foundation of proceedings substituted for an action, yet you may give a person out of the jurisdiction notice in the way of information —for instance, that it is intended to place him on the list of contributories of a company in liquidation. So, where there is a fund in Court, in which a person out of the jurisdiction is supposed to have or claim an interest, you may, without obtaining any leave from the Court, give that person notice of your intention to apply for a distribution of the fund, and that, if he does not claim it, you will assume he has no interest. There does not appear to be any difficulty in the plaintiff, in the present case, taking that course.

Mr. Terrell has referred to *Re Naylor's Residuary Personal Estate* (5) as an authority that an order giving leave for service abroad should be made. That was the case of a petition under the Trustee Relief Act, and is really an authority against that contention, for there Wickens V.C. held that the petition could

(1) 12 Q. B. D. 171.
(2) 2 V. & B. 407.
(3) L. R. 18 Eq. 655.
(4) L. R. 10 Ch. 275.
(5) 28 L. T. (N.S.) 18.
(6) 35 Ch. D. 1.

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not be served out of the jurisdiction. I observe that in Seton on Decrees (5th ed. p. 280), a form of order for service out of the jurisdiction is given, and the order seems to have been one made in chambers by Malins V.C. in a case of *Re Bailey, Bailey* v. *Bailey*. I doubt whether that order was rightly made, and I do not think it was really wanted, nor is such an order wanted here.

In my opinion, all that is necessary is that the plaintiff's solicitor should write a letter to the person out of the jurisdiction and inform him that, if he does not make any claim, it will be assumed that he has no interest and the Court will be asked to distribute the fund accordingly. The Court can protect the interest of the absenter, if he has any which ought to be protected.

A. L. SMITH L.J. concurred.

Solicitors: *C. Sawbridge & Son.*

G. I. F. C.

CHILTON *v.* PROGRESS PRINTING AND PUBLISHING COMPANY.

C. A. 1895 *April* 2.

[1894 C. 3036.]

Copyright—Periodical—Selections of Winning Horse—Piracy—Copyright Act, 1842 (5 & 6 *Vict. c.* 45), *ss.* 18, 19.

The Court will not define in general terms what amounts to a literary composition.

The plaintiff, who was the publisher of a registered weekly periodical, inserted each week, under the title of "One Horse Selections," a list of horses which he expected to win at races in the ensuing week. The defendants published each day at race-meetings a sheet or card giving, under the title, "The Specials, One Horse Finals," a list of horses which the plaintiff and other sporting authorities had selected as likely to win in races on that particular day, with the names of those who had selected them:—

Held (affirming the decision of Kekewich J.), that the announcement of the horses which the plaintiff had selected as winners was not in the nature of a literary composition which could be protected under the Copyright Acts; and that the defendants had not infringed the copyright in the plaintiff's periodical.

THE plaintiff was the publisher of a sporting journal, published weekly at the price of 1s., called *Chilton's Special Guide,*

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which was entered at Stationers' Hall in the Registry of Copyrights. Among other items of sporting news the plaintiff gave, under the heading of "One Horse Selections," a list of the horses which in his opinion would win in races in the ensuing week. The defendant company published on each day of every race-meeting a small sheet or card at the price of 1*d.* called *Sporting Snips*. They had recently adopted the system of publishing in their sheet short notices headed "The Specials—One Horse Finals," under which they gave a list of horses selected as likely to win at the races of the day, with the names of the periodicals or other authorities which selected them.

On Monday, August 13, 1894, the plaintiff published in his paper the following announcement:—

"One Horse Selections.

Tuesday	Keelson.
Wednesday . . .	Priestholm.
Thursday	Cœlus.
Friday	Dromonby."

On Tuesday, August 14, the defendants had in their sheet this notice:—

"The Specials, One Horse Finals.

The Jockey . . .	Rusina.	*Chilton* . . .	Keelson.
Racing World . .	Keelson.	*Grant's Opinion* .	Juda.
Gale's	Keelson.	*Turf Marvel* . .	Kenney."

On the following day, Wednesday, they gave a notice in a similar form containing, among other names, the words "*Chilton* . . . Priestholm."

The plaintiff complained of this practice as an infringement of his copyright, and brought the present action against the defendants to restrain them publishing or selling any copies of *Sporting Snips* containing any article or passage copied from, or only colourably altered from, *Chilton's Special Guide*.

The defendants contended that the words complained of were not in law the subject of copyright, and that the publication of them was not an infringement of the plaintiff's copyright in *Chilton's Special Guide*, and that the plaintiff had sustained no damage.

The plaintiff moved for an injunction, and the hearing of the motion was treated by consent as the trial of the action.

Kekewich J., before whom the motion was heard, held that there was nothing in the words complained of in the nature of copyright, and gave judgment for the defendants.

The plaintiff appealed from this judgment.

Warmington, Q.C., and *Waggett*, for the plaintiff. There are two questions here: first, whether this particular portion of the plaintiff's publication is copyright; and, secondly, if so, whether the defendants' publication is an infringement of that copyright. Upon the first question, that which the plaintiff has published is an expression of his opinion, for which he is entitled to charge. That opinion cannot be appropriated for publication by other persons, otherwise its value to the plaintiff is destroyed. Accordingly, he can have a copyright in that opinion, just as a man may have a copyright in a recipe for a dish or a medicine.

[LORD HALSBURY. What you want to protect is, not your newspaper, but your opinion.]

The question is, Do the defendants, by their publication, appropriate the result of that for which the plaintiff has protection by statute? A person may say, orally, "I have seen Chilton, and he says so-and-so"; but, if he puts that upon paper and publishes it, then it becomes a matter of copyright. The form of expression in which news is conveyed is subject of copyright, and the appropriation by one paper of even a very small part of another will be restrained: *Walter* v. *Steinkopff* (1); *Trade Auxiliary Co.* v. *Middlesborough and District Tradesmen's Protection Association.* (2) *Miller* v. *Wane* (3) is a somewhat similar case to the present; but there the interim injunction was refused because the Court was not satisfied from the evidence that the decline in the sale of the plaintiff's publication had arisen from the sale of the defendant's: the question of copyright was not decided. In *Sweet* v. *Benning* (4) it was held that the head-notes of law reports in the *Jurist* were copyright, and that an action

(1) [1892] 3 Ch. 489, 496.
(2) 40 Ch. D. 425.
(3) 11 Times L. R. 136.
(4) 16 C. B. 459.

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would lie for pirating them. So in *Butterworth* v. *Robinson* (1) an injunction was granted against pirating cases from the *Term Reports*, the difference being merely colourable.

[LORD HALSBURY. The question is whether there is a literary composition within the meaning of the Copyright Act, 1842 (5 & 6 Vict. c. 45). The object of the Act as stated in the preamble is "to afford greater encouragement to the production of literary works of lasting benefit to the world."]

That preamble has never been held to control the words in the 18th section protecting articles in periodical publications. The author of a book or the publisher of a periodical is entitled to protection against the piracy of his work, not only on the ground of its being a literary composition, but because it is an unauthorized use of the published results of his labours: *Kelly* v. *Morris* (2); *Caird* v. *Sime* (3); *Nicols* v. *Pitman* (4); *Maple & Co.* v. *Junior Army and Navy Stores* (5); *Wilson* v. *Luke* (6); Copinger on Copyright, 3rd ed. p. 64.

Marten, Q.C., and *Gatey*, for the defendants, were not called on.

LORD HALSBURY. I have not been able to entertain a doubt, that there is no copyright in this thing, notwithstanding the ingenious argument pressed upon us. It is really difficult to know by what name to describe it. What is really sought to be restrained is the publication of the fact that this gentleman, who is supposed to have good judgment as to winning horses, has expressed an opinion that this horse or that horse will win. It is idle to speak of this as something in the nature of literary composition such as is intended to be protected by the Copyright Act. It is not the form of printed words into which this gentleman has cast the result of his investigation which is sought to be protected. What is really sought to be protected is his opinion; and he has published his opinion, which is susceptible of being handed down from one person to another in any way, as it is admitted, except in writing. But it is contended by the applicant that if any person chooses to

(1) 5 Ves. 709.
(2) L. R. 1 Eq. 697.
(3) 12 App. Cas. 326.
(4) 26 Ch. D. 374.
(5) 21 Ch. D. 369.
(6) 1 Victorian L. R. 127.

print it and thereby make a copy of it that is an infringement. We must ask, first, whether the thing intended to be protected by the Act is such a subject-matter as this is. I am of opinion it is not. This is nothing in the nature of literary composition. Although I quite agree that the preamble of the Act cannot control the enacting part of the section in the Act itself, yet the preamble may well point out what is the subject-matter with respect to which the Act is intended to operate for the protection of a book. I can find no word in the Act which properly points out that such a matter as we are now dealing with is to be a subject-matter of protection. I therefore think there is nothing here which ought to be protected, and that there is no subject-matter of copyright.

Then with reference to the question whether there has been an infringement, I have not the least doubt as to the conclusion we ought to arrive at; but the difficulty is to state in dogmatic form a proposition which will justify my refusal to consider this an infringement by any rule of law; for it is essentially a question of fact. Assume a right to be protected. What is or is not an infringement of that right must in all cases depend upon the particular facts with which you are dealing, and any attempt to give in spoken or written language a definition which will include all cases must be a failure from the very nature of the thing with which we are dealing. I observe that Jervis C.J. says in the case which has been referred to of *Sweet* v. *Benning* (1): "It is undoubtedly exceedingly difficult, perhaps absolutely impossible, to lay down any general rule upon this subject. I do not assent to the argument urged by Mr. Lush, that every publication of a portion of a work in which there is subsisting copyright, will afford a ground of action: it is a question of degree, which must depend upon the circumstances of each particular case." That I believe to be absolutely true, and it forms the reason which renders it impossible for me to give any abstract proposition which can comprehend all cases. All I say in this case is that there is no subject-matter of copyright, and, if there was any, I think there is no infringement.

(1) 16 C. B. 459, 481.

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LINDLEY L.J. I am of the same opinion. I do not think there is copyright or infringement here at all. What is the plaintiff's copyright under the Act? The alleged copyright is in this thing—this sheet of letterpress. That does not mean that he has a copyright in every word of it; nor does it mean that he has a copyright in everything that can be found in it. Copyright has reference to some literary composition. Now, extending literary composition as widely as possible (and I do not think you can extend it wider than Wood V.C. did in deciding *Kelly* v. *Morris* (1), the Directory Case), the wording here is not in my opinion a literary composition.

Now, to say a man has a copyright in an opinion which he has expressed in writing or in print appears to me to be going too far. I may express my opinion in writing. It is not my opinion that is copyright: it is the mode of expression; it is the composition; it is the language in which I express it. Anybody, so far as I know, may publish my opinion, although if I publish it in the shape of literary composition he must not copy that composition. The plaintiff has published his opinion that a horse named Priestholm—to take that instance—is likely to win some race or other. Unless you find the one horse selection, and that block which is headed by the title "One Horse Selections," in the shape in which he has published it, I doubt whether you can bring it within literary composition at all. Perhaps the whole of that might be called literary composition; but there is no literary composition in the word "Priestholm." Now, what have the defendants done? Suppose you can call the plaintiff's one horse selection a literary composition, they appear to me to have set to work to produce a collection of opinions. That is not what the plaintiff is doing at all. The defendants have done some independent work which they think will be useful to their readers. They have printed a sheet to tell people who care about races what the published opinions are of the chances of horses winning a particular race, and they have taken the trouble to collect the opinions of people on that subject. I do not think they have infringed the plaintiff's copy-

(1) L. R. 1 Eq. 697.

right, assuming that he had one. On both grounds, I think this action fails; but I admit the difficulty of putting into language and defining expressly that which parliament has left intentionally undefined: I mean literary composition. I think here one can see on which side of the line this case falls, and in my opinion it falls on the wrong side, and there is neither composition nor infringement.

A. L. SMITH L.J. In this case Chilton, the plaintiff, asserts that his copyright has been infringed by the defendants. He asks for an injunction. The only thing he complains of is that the defendants have taken the name of a horse called Keelson in one case and Priestholm in another, and added thereto Chilton's name, and published it in what is called their *Sporting Snips*. Now, to succeed, Chilton must make out he has a copyright in the publication which he says has been infringed; and, secondly, he must make out that what has been done by the defendants is an infringement of the right of copyright which he has. I am going to confine my judgment entirely to the facts of this case. Lord Halsbury has said, and Lindley L.J. has agreed, that it is impossible to lay down words of general definition which include every case. I do not say whether or not in the plaintiff's paper that paragraph under the head of "One Horse Selections," taking it as a whole, constitutes a literary composition or not, because that is not the question now before the Court. The question is whether the plaintiff has a copyright in the word "Priestholm" or the name of any other horse in that paragraph. It is impossible to say that is a literary composition. Therefore, it appears to me in this case the plaintiff fails in the first part of what he has to do, namely, to prove he has a copyright in what he says is infringed.

Then comes the next point. Assuming that he has a copyright in the word "Priestholm"—and in my judgment he clearly has not—what is it the defendants have done? They have not copied the paragraph called "One Horse Selections" in any shape at all as a paragraph, but all they have done is to collect from other prophets or would-be prophets what they say would probably be the horse which would win a given race, and, among

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many prophets, or six prophets, whose opinions the defendants have collected, they say Chilton says Priestholm will probably win. It seems to me that is no infringement even if the whole paragraph were subject-matter of copyright: taking the one word out of it and adding Chilton's name to it is not infringement of that.

For both these reasons I think the application for an injunction fails, and the appeal must be dismissed with costs.

Solicitors: *Chester & Co., for Crofton & Craven, Manchester; J. Amery Parkes.*

M. W.

C. A. 1894 KEKEWICH J. *Nov.* 21. C. A. 1895 *March* 19, 20; *April* 5.

MARSHALL *v.* SOUTH STAFFORDSHIRE TRAMWAYS COMPANY.

[1893 M. 1156.]

Tramway Company—Debenture-holder—Default of Company—Appointment of Manager—Sale of Undertaking—Tramways Act, 1870 (33 & 34 *Vict. c.* 78), *s.* 44.

The holders of debentures issued by a tramway company governed by the Tramways Act, 1870 (whether the company be incorporated under the Companies Act, 1862, or by a special Act), by which debentures the undertaking of the company and all its property present and future, including uncalled capital, are charged, are, in the event of default by the company, entitled only to the appointment of a receiver of the undertaking of the company and the net earnings thereof; they are not entitled to an order for the sale of the undertaking, or to the appointment of a manager.

Bartlett v. *West Metropolitan Tramways Co.* ([1893] 3 Ch. 437; [1894] 2 Ch. 286) disapproved.

Per Kekewich J.:—Plaintiffs suing on behalf of a class should specify that class as accurately as possible. For instance, where, in an action brought by a debenture-holder suing on behalf of himself and all other the holders of debentures in a limited company which had been dissolved and reincorporated by a special Act under the name of the defendant company, the plaintiff was described in the title of the action as suing "on behalf of himself and other the holders of the debentures of the defendant company and its predecessors in title":—

Held, that this description was too vague and required amendment.

THIS was a debenture-holders' action against the South Staffordshire Tramways Company, incorporated by the South

Staffordshire Tramways Act, 1889 (52 & 53 Vict. c. cxci.). That company was the statutory successor of the South Staffordshire and Birmingham District Steam Tramways Company, Limited, a company which was dissolved by that special Act and thereby reincorporated under the name of the defendant company.

The action was brought by the plaintiffs "on behalf of themselves and all other the holders of the mortgage debentures issued by the defendant company and its predecessors in title," for the purpose of having the property of the defendant company, comprised in the debentures held by the plaintiffs and those whom they represented, realized under the direction of the Court and applied in payment of the debentures, the ground of the action being default in payment of the interest on the debentures.

The debentures held by the plaintiffs and those on whose behalf they sued were originally issued by the dissolved limited company, which was formed and registered in 1883 under the Companies Act, 1862, for the purpose of making and working certain tramways. Power to make and work them was obtained by the company from the Board of Trade by means of provisional orders under the Tramways Act, 1870. The debentures were for 100*l.* each, repayable on August 1, 1897, with interest in the meantime at 5 per cent., payable half-yearly, and the company thereby charged with the payments of principal and interest "its undertaking and all its property present and future, including uncalled capital." The conditions upon which the debentures were issued were as follows:—

"1. This mortgage debenture is one of a series of mortgage debentures, issued or about to be issued, by the company for securing an aggregate sum of 50,000*l.*, with interest at the rate of 5*l.* per cent. per annum.

"2. The debentures of the said series shall rank pari passu as a first charge upon the property of the company, without any preference or priority one over another.

"3. Notwithstanding the charge hereby created, the company shall be at liberty in the course of its business, and for the purpose of continuing and carrying on the same, to use, employ, sell, lease, exchange, or otherwise deal with all or any part of the

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said property, or call up its uncalled capital, unless default shall be made in payment of any principal moneys or interest hereby secured for the space of three calendar months after the same respectively shall have become due according to the tenure of this debenture, or the company shall go into liquidation either voluntarily or by the order of a competent Court.

"4. In the event of such default or such going into liquidation, whichever shall first happen, the liberty and authority to the company hereinbefore given shall cease, and the charge by the indenture created shall and may be immediately enforceable.

"5. Nothing herein contained shall be taken to authorize the creation of any mortgage or charge of or upon the said property, or any part thereof, having priority over the said charge."

The debentures did not confer any express power of sale upon the holders.

The debentures were issued under a power to borrow money contained in the limited company's articles of association.

By the South Staffordshire Tramways Act, 1889 (52 & 53 Vict. c. cxci.), the limited company was dissolved and was re-incorporated as a new company, that is, the defendant company.

By s. 2 of this Act the Companies Clauses Consolidation Act, 1845, Parts I. and II. of the Companies Clauses Act, 1863, as amended by the Companies Clauses Act, 1869, parts of the Lands Clauses Consolidation Act, 1845, and of the Lands Clauses Consolidation Acts Amendment Act, 1860, and Parts II. and III. of the Tramways Act, 1870, "so far as the same respectively are applicable to and are not varied by or inconsistent with the provisions of this Act," were incorporated with the Act.

The Act recited a number of provisional orders under which the tramways afterwards acquired by the limited company had been constructed, and by s. 3 the expression "the promoters" was defined as meaning "the promoters respectively referred to and empowered by the said" (provisional) "orders, and also any other persons or corporations in whom the rights, powers, and authorities of the original promoters of such orders respectively are now vested."

By s. 34 the defendant company were empowered to borrow on

mortgage of their undertaking any sums not exceeding in the whole 50,000*l.*, including the amount then owing on the mortgage debentures of the limited company.

Sect. 35: "The mortgage debentures issued by the limited company as aforesaid shall, while subsisting, rank equally with all or any mortgages to be made or issued by the company under this Act, and subject to this provision the holders of the mortgage debentures issued by the limited company shall, as against the undertaking of the company, have, after the passing of this Act, and be entitled to the same rights and remedies in all respects under or in respect of the mortgage debentures held by them respectively, or the principal moneys and interest thereby intended to be secured, as they would respectively have had or been entitled to as against the undertaking of the limited company if this Act had not been passed."

By s. 36, an express power was given to the mortgagees of the undertaking of the defendant company (including the holders of the mortgage debentures issued by the limited company) to enforce payment of arrears of interest or principal, or principal and interest, due on their mortgages by the appointment of a receiver.

By the Walsall and District Tramways Order, 1882 (one of the provisional orders recited in the Act), which was confirmed by the Tramways Orders Confirmation (No. 3) Act, 1882 (45 & 46 Vict. c. ci.), various duties in favour of the public were imposed on the promoters. By clause 10 the promoters were required to maintain and keep in good condition and repair to the satisfaction of the road authority the rails of the tramways and the substructure, and a penalty was imposed for default in so doing. By clause 33 the promoters were required to run a carriage at least twelve times each way, at suitable intervals between certain specified hours, on one of their tramways designated as No. 1. By clause 36 the promoters were required to run at least two carriages each way every morning and evening (with certain exceptions) at specified hours for the benefit of the working classes at cheap fares.

On May 5, 1893, an interlocutory order was made in the action appointing interim receivers and managers of the under-

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taking of the defendant company and all its property, both present and future (including uncalled capital), comprised in the charge created by the debentures issued by the limited company, and to manage and work the tramways, and to carry on the business of the defendant company.

The action came on for trial before Kekewich J. on November 21, 1894, the question being whether the Court had jurisdiction, at the instance of the debenture-holders of the dissolved limited company, to make an order for a sale of the defendant company's undertaking, and for the appointment of a manager, in addition to a receiver, until sale.

Warmington, Q.C., and *Willis Bund*, for the plaintiffs, contended that they were entitled to an order for sale and the appointment of a receiver and manager. [They cited *In re Panama, New Zealand and Australian Royal Mail Co.* (1); *Makins* v. *Percy Ibotson & Sons* (2): and distinguished *Blaker* v. *Herts and Essex Waterworks Co.* (3) and *Gardner* v. *London, Chatham and Dover Ry. Co.* (4)

Bramwell Davis, for the defendant company, contended that the debentures did not confer upon the holders the right to sell the undertaking or to have a manager appointed; that the meaning of the special Act was, that the debentures of the limited company and the mortgages of the defendant company should rank pari passu, and be subject to the same rights and remedies as the mortgages of a company incorporated for a public purpose, including the right to the appointment of a receiver (but not a manager), as settled by *Gardner's Case.* (4) [He also relied on *Blaker's Case.* (3)]

Warmington, Q.C., in reply.

KEKEWICH J. The plaintiffs sue "on behalf of themselves and all other the holders of the mortgage debentures issued by the defendant company and its predecessors in title." That seems to me to be about as wrong a title as well can be. I enter an emphatic protest against such a description as "pre-

(1) L. R. 5 Ch. 318.
(2) [1891] 1 Ch. 133.
(3) 41 Ch. D. 399.
(4) L. R. 2 Ch. 201.

decessors in title" of a company or person as a foundation of a title to relief. The plaintiffs must specify the class on behalf of whom they sue, and anything so vague as this description will not be allowed, as far as I am concerned. The class on whose behalf the plaintiffs really sue is the holders of debentures issued by the limited company in its full description. If they like to add "now dissolved" they can, but I must have the record amended so as to give the proper description of the plaintiffs before I can get any further. For the present purpose I treat that as done. Possibly it may be right to amend the statement of claim also, not only as regards the title, but also in other respects.

I have, therefore, to consider the rights of the debenture-holders of the limited company now dissolved, and no others. According to such statements as I have before me, but which are obviously not complete, and may require some investigation, the limited company in this case occupied, while it still existed, a position precisely, or to all intents and purposes, the same as that of the limited company which was the subject of criticism in *Blaker* v. *Herts and Essex Waterworks Co.* (1) There the limited company purported to issue debentures in the form with which we are familiar as being issued by commercial companies, charging with the payment of the principal and interest the undertaking, lands, works, property and effects, both present and future, of the company in the ordinary way; and, notwithstanding that form of debenture, Kay J. held that, as the company was a company for a public purpose, he could not appoint a manager, and he could not sell, but that all that he could do was to treat the debentures as a charge on the fruit-bearing tree without destroying the tree (taking the illustration which was used so freely and forcibly by Lord Cairns in *Gardner* v. *London, Chatham and Dover Ry. Co.* (2)); and that, therefore, the plaintiff was entitled only to such an order as was given to the plaintiff in *Gardner's Case* (2), and no more. If the facts are correct as stated to me by Mr. Bramwell Davis (and I have no reason to doubt it), the result is that I should follow *Blaker* v. *Herts and Essex Waterworks Co.* (1) There may be

(1) 41 Ch. D. 399. (2) L. R. 2 Ch. 201.

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points in the judgment of the learned judge in that case upon which one would desire further argument and consideration if one were going to follow the whole of his judgment; but the principle seems to me to be perfectly straightforward, and, even if I did venture to differ from it, I should certainly not venture to avoid following it. I do not differ from it, and I do follow it. So far, therefore, I am simply following that authority; but, though Mr. Bramwell Davis has made out his case to a great extent, I have not got all the facts here—that is, not all the provisional orders, not all the documents—which would be necessary to establish with precision that the limited company here is in the same position as the limited company in *Blaker's Case*. (1) It would be unsatisfactory to dispose of the case entirely on that ground, and, as here there certainly is another point of very great importance to the plaintiffs, I do not think it will be satisfactory or fair to them not to deal with it.

The limited company issued debentures in what I call the ordinary form—that is to say, the form now familiar with reference to the debentures of a limited company. I will assume for this purpose that those debentures had the force which, as I have already said, I do not think can, under the circumstances, be attributed to them—that is, that they had the same force as the debentures of other companies with which I deal almost daily—ordinary commercial companies. But the limited company has ceased to exist. It has been incorporated with the South Staffordshire Tramways Company—that is, the defendant company. That company was incorporated by an Act of Parliament which itself incorporates the Companies Clauses Consolidation Act, 1845, and other Acts applicable to such a company which are generally found incorporated in special Acts. It is a company for the construction and working of tramways, with borrowing powers limited by the special Act and by the general Acts referred to, and having privileges, liabilities, and duties all established by the same authority. This company can only issue debentures under the authority of their Act, and it can only do so in some such form as is provided by the Companies Clauses Consolidation Act, 1845; and it can only give to the debenture-

(1) 41 Ch. D. 399.

holders—or more strictly speaking (as is sometimes forgotten) the "mortgagees," which is the term in the Act—such rights and remedies as the Act enables it to give. The limit of those rights and remedies was thoroughly tested in 1867 in *Gardner's Case* (1), from which there has never been the slightest departure.

The rights and remedies given by the Companies Clauses Consolidation Act, 1845, are not the rights and remedies of the debenture-holders of an ordinary commercial company: they are of a different character, and of a very much more restricted nature. Therefore, on the assumption which I mentioned just now, which assumption may be incorrect, I have two classes of debenture-holders claiming or deriving authority under this special Act—that is to say, the debenture-holders depending on the ordinary powers of a limited company incorporated under the Act of 1862, and the debenture-holders claiming under the authority of a special Act which incorporates the Companies Clauses Consolidation Act, 1845. Now, those two classes are entirely different. How are they to be reconciled? How are they to run as regards priority—as regards their rights—one as against the other? That question was present to the framers of this special Act. Whether they have settled it in the most satisfactory way is another question; but the legislature has, in fact, provided for the difficulty in language which now I have to construe. I do not think I need, after what I have said, refer to the earlier sections of the special Act, some of which refer to borrowing powers, and so forth. The borrowing powers are in s. 34. Then we come to s. 35, and when we have construed that section everything else may be made to fit in without much difficulty.

Sect. 35, in the first place, established an equal rank as between the debentures issued by the limited company and the "mortgages," as they are properly called, issued by the defendant company. They are to rank equally. One therefore starts, at any rate, with this, that, as regards priority, there is to be none. There is to be no right of preferential payment. But then the section goes on to say that, subject to that provision—that is, as to equal rank—the holders of the mortgage debentures issued by

(1) L. R. 2 Ch. 201.

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the limited company shall, "as against the undertaking" of the defendant company, have such rights and remedies as they would respectively have had or been entitled to "as against the undertaking of the limited company" if the Act had not been passed. Now, I find in this section the word "undertaking" used with reference to the company—that is, the defendant company incorporated by special Act—a word which, as used in the incorporated general Acts, has a meaning which has been ascertained over and over again and is thoroughly well understood; and then, in the very same section, and with reference to "rights and remedies," I have the words "undertaking of the limited company," which we all know to mean something entirely different, and to comprehend nearly every kind of property that the limited company can possess. The confusion is there. I am quite unable to get rid of it. I do not see how I can; but it must mean this, that, as against the undertaking of the defendant company—the undertaking defined by Act of Parliament and by decision—the debenture-holders of the limited company are only to have those rights and remedies which the holders of the debentures issued by the defendant company would have against that same undertaking. It cannot mean more than that. The result is to level down, if I may use the expression, the debentures issued by the limited company; for if I do not adopt that conclusion, I must level up the debentures issued by the defendant company, and that would certainly be against the language of the statute, and against all the authorities on the subject with which I am acquainted. The meaning must be, I think, that henceforward there is to be a perfect equality between the debentures issued by the limited company and the debentures issued by the defendant company. They are all debentures charging the undertaking with the rights and remedies defined in *Gardner's Case* (1), and with no rights and remedies other than those given by the decision in *Gardner's Case.* (1) So that the section should be read as saying, "The rights and remedies of both of you are really the same now, and what it is necessary to provide is that you shall rank pari passu to all intents and purposes." That gives a sensible construction to the Act of

(1) L. R. 2 Ch. 201.

Parliament, and one consistent with the facts and with the decisions; and I think it would be a preposterous construction to hold that the plaintiffs, the debenture-holders of the limited company, are entitled now to pull the defendant company to pieces and have it sold in order to satisfy them, when these other debenture-holders of the defendant company have no such rights and can only get a receiver, as in *Gardner's Case*. (1)

The result is, in my view, that the plaintiffs have no right to a manager. The Court cannot undertake the management of this concern unless it be within some statute, and then only on proper proceedings, and the Court has no jurisdiction to order this property to be sold. All that the plaintiffs are, to my mind, entitled to is the appointment of a receiver, with proper inquiries, as in *Gardner's Case* (1)—and, of course, that is not disputed—in order to ascertain the right position of the holders of debentures issued by the limited company. There must be added an inquiry to ascertain what debentures have been issued by the defendant company, the holders of which are by statute made to rank equally with the holders of those issued by the limited company. With that additional inquiry the order must, under the circumstances, follow the form of the judgment in *Gardner's Case* (1), which was carefully settled and has been constantly followed. Accordingly the order will be to the following effect: There will be a declaration that the plaintiffs, as holders of the debentures issued by the limited company, have, equally with the holders of the debentures issued by the defendant company, a charge upon the undertaking. There will also be a declaration that the plaintiffs are not entitled to such an appointment of a receiver and manager as is asked, nor to an order for sale, and the interim order appointing receivers and managers will be discharged; but they will have a receiver only of the undertaking and of the net earnings thereof; and there will be an order for inquiries as I have indicated.

The plaintiffs appealed. The appeal came on for hearing on March 19, 1895. C. A.

G. I. F. C.

(1) L. R. 2 Ch. 201.

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Warmington, Q.C., and *Willis Bund*, for the plaintiffs. The debenture-holders have the same rights as they had before the limited company was reorganised by the special Act. Although the debentures contain no power of sale, they give the holders an equitable charge on the property of the company which entitles them to an order for sale. There is nothing in the constitution or objects of tramway companies to make them an exception from the ordinary rule. They stand in a different position from that of railway companies, and are not affected by the principles laid down in *Gardner* v. *London, Chatham and Dover Ry. Co.* (1) No land is vested in them; there is no statutory obligation imposed upon them by the Tramways Act, 1870, to work the tramways, and the promoters have under s. 44 of that Act power to sell the undertaking with the consent of the Board of Trade. A tramway company can be wound up under the Companies Acts, and the undertaking can be sold by the Court in the winding-up: Tramways Act, 1870 (33 & 34 Vict. c. 78), ss. 35, 36, 41, 42, 43, 44 (2); Companies Act, 1862 (25 & 26 Vict.

(1) L. R. 2 Ch. 201.

(2) By the Tramways Act, 1870, s. 4, "Provisional orders authorizing the construction of tramways in any district may be obtained by—

"(1.) The local authority of such district; or by

"(2.) Any person, persons, corporation or company, with the consent of the local authority of such district; or of the road authority of such district where such district is or forms part of a highway district formed under the provisions of the 'Highway Acts':

"And any such local authority, person, persons, corporation or company shall be deemed to be promoters of a tramway, and are in this Act referred to as 'the promoters.'"

Sect. 8 empowers the Board of Trade to make provisional orders.

By s. 14 a provisional order is not to have any operation until it is confirmed by Act of Parliament.

Sect. 19 enables a local authority to lease a tramway of which they have acquired possession.

By s. 24, "The term 'the promoters' shall mean any person, persons, corporation, company, or local authority authorized by special Act to construct a tramway."

Sect. 35 enables the Board of Trade in certain events to grant licences to third parties to use tramways.

Sect. 41 empowers the Board of Trade, in case the promoters discontinue the working of a tramway for three months, to declare the powers of the promoters to be at an end, and in that case the road authority of the district may remove the tramway.

By s. 42, in case of the insolvency of the promoters, a similar power is given to the Board of Trade to declare their powers at an end.

By s. 43 power is given to the local

c. 89), s. 199. If the undertaking can be sold under a winding-up order there is no reason why it should not be sold in a debenture-holders' action. The reported decisions are all in favour of the plaintiffs' claim: *Hope* v. *Croydon and Norwood Tramways Co.* (1); *Bartlett* v. *West Metropolitan Tramways Co.* (2); *In re Borough of Portsmouth Tramways Co.* (3); *In re Barton-upon-Humber and District Water Co.* (4); *In re Brentford and Isleworth Tramways Co.* (5)

Sir R. E. Webster, Q.C., Bramwell Davis, Q.C., and *C. E. E. Jenkins*, for the company. A tramway company is created for the benefit of the public in the same sense as a railway company is; and the principles laid down in *Gardner* v. *London, Chatham and Dover Ry. Co.* (6) apply to it equally with a railway company. It is true that an order for winding up a tramway company can be made; but in that case other considerations would arise, and the wishes of the general body of the creditors would be consulted.

Various clauses of the Provisional Order of 1882 shew that the legislature contemplated that the management of the tramways would remain in the hands of the promoters. The undertaking is one in which the public have an interest, and the promoters

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authority in certain events to purchase from the promoters their undertaking, and upon the sale all the rights, powers and authorities of the promoters in respect to the undertaking sold are to be transferred to and vested in, and may be exercised by, the authority to whom the same has been sold, and in reference to the same they shall be deemed to be the promoters.

By s. 44, "Where any tramway in any district has been opened for traffic for a period of six months the promoters may, with the consent of the Board of Trade, sell their undertaking to any person, persons, corporation or company, or to the local authority of such district, and when any such sale has been made all the rights, powers, authorities, obligations, and liabilities of such promoters in respect to the undertaking sold shall be transferred to, vested in, and may be exercised by, and shall attach to the person, persons, corporation, company, or local authority to whom the same has been sold, in like manner as if such tramway was constructed by such person, persons, corporations, company, or local authority under the powers conferred upon them by special Act, and in reference to the same they shall be deemed to be the promoters."

(1) 34 Ch. D. 730.

(2) [1893] 3 Ch. 437; [1894] 2 Ch. 286.

(3) [1892] 2 Ch. 362.

(4) 42 Ch. D. 585.

(5) 26 Ch. D. 527.

(6) L. R. 2 Ch. 201.

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are, at any rate by implication, bound to keep the tramways open and in working for the benefit of the public. The company could not give to the debenture-holders the powers which the debentures purport to give, unless the mortgage of the "undertaking" is limited, as it was in *Gardner* v. *London, Chatham and Dover Ry. Co.* (1), to a mortgage of the tolls. The principle of the decisions in that case and in *Blaker* v. *Herts and Essex Waterworks Co.* (2) applies. Any provision which would deprive the promoters of the management of the tramways, or for a sale of the undertaking, would be ultra vires. The power of sale given by s. 44 of the Tramways Act, 1870, is personal to the promoters, and cannot be transferred to debenture-holders. Companies to which special powers are given by statute are prohibited from doing what they are not expressly permitted to do: *Attorney General* v. *Great Eastern Ry. Co.* (3); *Baroness Wenlock* v. *River Dee Co.* (4) As to the rights of creditors of a company in whose undertaking the public have an interest, see *Potts* v. *Warwick and Birmingham Canal Navigation Co.* (5)

As to the cases relied on for the plaintiffs, *In re Brentford and Isleworth Tramways Co.* (6) is only a decision that a tramway company can be wound up under s. 199 of the Companies Act, 1862. There would be power to sell the property of the company in a winding-up, but there is no winding-up here. In *Hope* v. *Croydon and Norwood Tramways Co.* (7) North J. in the first instance only made an order for the appointment of a receiver. An order was afterwards made (as appears from the report of *Bartlett* v. *West Metropolitan Tramways Co.* (8)) for the sale of the undertaking, tramways, and property of the Croydon company as a going concern; but the case is not reported. In *In re Barton-upon-Humber and District Water Co.* (9) an order was made to wind up a water company, and North J. commented upon *Blaker* v. *Herts and Essex Waterworks Co.* (2), and said it was possible that the company's undertaking and property could

(1) L. R. 2 Ch. 201.
(2) 41 Ch. D. 399.
(3) 5 App. Cas. 473.
(4) 10 App. Cas. 354.
(5) Kay, 142.
(6) 26 Ch. D. 527.
(7) 34 Ch. D. 730.
(8) [1894] 2 Ch. 288.
(9) 42 Ch. D. 585.

not be sold without the authority of an Act of Parliament. In *In re Borough of Portsmouth Tramways Co.* (1) Stirling J. ordered a tramway company to be wound up upon the petition of a debenture-holder, and he was evidently of opinion that the company's undertaking could not be sold by the order of the Court except in a winding-up, and that the principle of *Gardner* v. *London, Chatham and Dover Ry. Co.* (2) applied, and that a debenture-holder of a tramway company was only entitled to what Lord Cairns in that case called "the fruit" of the undertaking, i.e., the tolls. No doubt in *Bartlett* v. *West Metropolitan Tramways Co.* (3) North J. appointed a receiver and manager of a tramway company at the instance of debenture-holders, and afterwards ordered a sale of the company's undertaking and property, with the consent of the Board of Trade. But there the company did not oppose the order, and the point does not appear to have been really argued or fully considered. *Blaker* v. *Herts and Essex Waterworks Co.* (4) was not cited.

Even if the Court should hold that there is power to order a sale, a manager ought not to be appointed.

[They referred also to *Edinburgh Street Tramways Co.* v. *Lord Provost of Edinburgh.* (5)]

Willis Bund, in reply. As mortgagees the plaintiffs are entitled to the assistance of the Court in realizing their security by means of a sale. Sect. 44 of the Tramways Act, 1870, distinguishes a tramway company from a railway company, and in cases to which that section applied the Court has at the instance of debenture-holders appointed a receiver and manager, and has ordered a sale of the company's undertaking and property. *Gardner* v. *London, Chatham and Dover Ry. Co.* (2) and *Blaker* v. *Herts and Essex Waterworks Co.* (4) do not apply.

Cur. adv. vult.

April 5. LINDLEY L.J. read the judgment of the Court (Lord Halsbury, and Lindley and A. L. Smith L.JJ.), in which, after stating the facts, he continued:—By the special Act of 1889 (52 & 53 Vict. c. cxci.), speaking generally, all the rights and

(1) [1892] 2 Ch. 362.
(2) L. R. 2 Ch. 201.
(3) [1893] 3 Ch. 437; [1894] 2 Ch. 286.
(4) 41 Ch. D. 399.
(5) [1894] A. C. 456, 471.

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obligations of the limited company are vested in the defendant company; and whatever rights the debenture-holders of the limited company had over its tramways and undertaking are preserved and made applicable to the larger undertaking of the new company, subject only to this qualification—namely, that the debentures issued by the limited company and those to be issued by the new company are all to rank pari passu, so as to exclude any question of priority inter se. Such is the short effect of the special Act (see ss. 7, 9, 10, 13, 34, 35). The question, therefore, raised by this appeal is whether the holders of the debentures of the limited company had any right to enforce their securities by a sale of the tramways and undertaking of the limited company. The debenture contains no power of sale; but it unquestionably creates an equitable lien or charge on the property of the limited company; and, if this property were ordinary property in which the public had no particular interest, the security would confer upon the holder the right to have the property sold by the Court and applied in payment of his debt, if the principal or interest were due and unpaid. Speaking generally, the owner of an equitable charge or lien on property as a security for money which is due and payable has a right to a judicial sale of that property in order to satisfy the charge or lien: see *Neate* v. *Duke of Marlborough*. (1) But this right does not extend to property, or what is called an undertaking, which has been acquired under statutory powers for public purposes, if those purposes will be defeated, or at all events seriously affected, by a judicial sale. This exception to the general rule is as well settled as the rule itself: see *Gardner* v. *London, Chatham and Dover Ry. Co.* (2) It becomes necessary, therefore, to consider what a tramway company is, and what its undertaking is, and to determine whether an equitable lien or charge upon its tramways and undertaking falls within the general rule or within the exception to it. Tramways and tramway companies, however formed, are all governed by the Tramways Act, 1870 (33 & 34 Vict. c. 78), to which it is necessary to refer. By this statute provision is made for obtaining from the Board of Trade provisional orders authorizing the construction of

(1) 3 My. & Cr. 407, 417. (2) L. R. 2 Ch. 201.

tramways (ss. 4, 8). Provisional orders so obtained have to be submitted to Parliament for confirmation, and the Act confirming a provisional order is to be deemed to be a public general Act (s. 14). The persons authorized to construct a tramway, either by a provisional order or by any special Act, are referred to as "the promoters" (ss. 4, 24), and they may be the local authority of the district in which the tramway is to be made, or any person, persons, corporation, or company (s. 4). But persons to whom tramways have been sold under those sections which authorize their sale are also deemed to be promoters (see ss. 43, 44). So that the expression "promoters" really means, not only the persons originally authorized to construct a tramway, but also their permitted assigns. It is, however, plain that neither lessees (s. 19) nor licensees (s. 35) are promoters. Moreover, the term "promoters" does not include debenture-holders. Debenture-holders have no right to exercise the statutory powers conferred by the Act or provisional orders on the promoters; nor are debenture-holders liable to perform the statutory duties imposed upon the promoters by the Act or by provisional orders made under its authority. It is important to bear this in mind in considering the right to sell the tramways. The Tramways Act, 1870, is silent on the subject of borrowing money by the promoters; but provisional orders sometimes contain regulations on the subject. The power of the limited company to borrow money on the security of their property was not questioned in this case. Such a power was expressly conferred by its articles of association (see art. 72, cl. ix.). Nor, indeed, can the validity of the debentures issued by the limited company be disputed after their express recognition in the defendant company's special Act. The Tramways Act, 1870, does not in terms require the promoters either to make or maintain the tramways which they are authorized to construct. But the Act nevertheless enables the Board of Trade to grant licences to other persons to use tramways, if the public are deprived of their full benefit (s. 35), and authorizes the Board of Trade to put an end to the powers of the promoters over disused tramways, which may then be removed at the expense of the promoters (s. 41). Similar authority is given to the Board of Trade if the promoters

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are insolvent, so that they are unable to maintain the tramway or work the same to the advantnge of the public (s. 42). But although the Act itself assumes rather than imposes duties in favour of the public, the provisional orders made under the Act frequently impose such duties in express terms. For example, one of the provisional orders in this case requires the promoters to maintain their tramways to the satisfaction of the road authorities, and to run carriages twelve times a day, and to run two carriages each way at low fares (see the Walsall and District Tramways Provisional Order of 1882, ss. 10, 33, 36). The interest of the public in the working of the undertaking of a tramway company is apparent throughout the whole legislation, and this circumstance goes far to bring tramway companies into the same category as railway and other companies formed for public purposes, and to distinguish them from ordinary trading companies in whose property and undertakings the public have no interest. In two important respects, however, railway companies differ from tramway companies. First, railway companies (unless the Railway Abandonment Acts apply to them) cannot be wound up under the Companies Act, 1862, and tramway companies can (see Companies Act, 1862, s. 199); secondly, railways cannot be sold by the companies to which they belong, whilst tramways can be sold by the promoters, with the sanction of the Board of Trade (see ss. 43 and 44 of the Tramways Act, 1870). But when the jurisdiction to wind up is not invoked the first of those differences is unimportant; and as the debenture-holders are not promoters, and cannot either sell under the statutory powers conferred on the promoters or require the promoters to sell under those powers, the second difference does not assist them. Notwithstanding those differences, it may therefore be truly said that, as regards the securities which tramway companies can give and the remedies of their mortgagees and debenture-holders, those companies are within the principles expounded by Lord Cairns in the great case of *Gardner* v. *London, Chatham and Dover Ry. Co.* (1) and by the present Lord Justice Kay in *Blaker* v. *Herts and Essex Waterworks Co.* (2) [His Lordship read passages from the judgment of Lord

(1) L. R. 2 Ch. 201. (2) 41 Ch. D. 399.

Cairns. (1)] The first part of the passage on pp. 211 and 212 relates more particularly to the difficulty of selling; but the second part of the same passage refers to the peculiarities of the undertaking which make it improper for the Court to take its management upon itself; and this part of the judgment, as well as the celebrated passage on p. 217, are as applicable to tramway companies as to railway companies. In *Blaker* v. *Herts and Essex Waterworks Co.* (2) Kay L.J. decided two points which are important on the present occasion. First, he held that s. 19 of the Conveyancing Act, 1881, conferring powers of sale on mortgagees, did not apply to debentures in the ordinary form; and, secondly, he held that the principle of *Gardner* v. *London, Chatham and Dover Ry. Co.* (3) applied as much to waterworks companies as to railway companies. The fact that waterworks companies can be wound up under the Companies Act, 1862 (see s. 199), and that in the winding-up the company's property can be sold by the liquidator, does not appear to have been noticed either by counsel or by the Court. But, whatever the jurisdiction of the Court may be under the Companies Act, 1862, that jurisdiction is not invoked and cannot be exercised in an ordinary action by a debenture-holder; and the learned judge, therefore, held, and held quite rightly, that no sale could be ordered in such an action of the undertaking and works of a waterworks company. It consequently followed that no manager ought to be appointed. It is noteworthy that in *Blaker* v. *Herts and Essex Waterworks Co.* (2) a receiver and manager had been appointed until the trial of the action. But, when the case was more fully argued and considered, the judgment was that no manager ought to be appointed. Cases, however, have been referred to in which receivers and managers of tramways have been appointed in actions brought by the holders of debentures against tramway companies, and in one of them a sale was directed subject to the consent of the Board of Trade. These cases require notice. The first was *Hope* v. *Croydon and Norwood Tramways Co.* (4), in which North J. appointed a receiver and manager by an order dated

(1) L. R. 2 Ch. 211, 212, 217.
(2) 41 Ch. D. 399.
(3) L. R. 2 Ch. 201.
(4) 34 Ch. D. 730.

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February 4, 1887; and on June 24, 1889, the undertaking and tramways and real and personal property of the company were ordered to be sold as a going concern (see the order in Seton on Judgments, 5th ed. vol. ii. p. 1686). This was apparently followed in 1892 by Chitty J. in *City of London Contract Corporation* v. *Coventry and District Tramways Co.* (1), where a conditional agreement for a sale of the undertaking and property of the company was sanctioned. The next case is *Bartlett* v. *West Metropolitan Tramways Co.* (2), in which North J. first appointed a receiver and manager, and afterwards directed a sale with the consent of the Board of Trade. These cases were all passed over very lightly; in none of them was there any real opposition by the company; and they can hardly be regarded as deliberate judgments. Stirling J., in *In re Borough of Portsmouth Tramways Co.* (3), ordered a tramway company to be wound up at the instance of a debenture-holder; but the learned judge evidently thought that the principle of *Gardner* v. *London, Chatham and Dover Ry. Co.* (4) was applicable to the debentures of tramway companies—a view which is inconsistent with any right to a receiver and manager and a sale as incidental to the security constituted by the debentures. The power of sale conferred by s. 44 of the Tramways Act, 1870, does not enable a tramway company to give to its debenture-holders a right to sell the company's tramways and undertaking, nor a right to a judicial sale under the order of the Court in an action brought to enforce the security. In the event of a sale under that section the proceeds of sale would form part of the debenture-holders' security, but it does not follow that the power of sale conferred upon the promoters by that section can be exercised by the plaintiffs or by the Court. But, unless it can be so exercised, the case cannot be distinguished from *Gardner's Case.* (4) The conclusions thus arrived at really dispose of this appeal. The principle of *Gardner's Case* (4) applies to all tramway companies governed by the Tramways Act of 1870, whether the promoters are local authorities or private individuals, or companies formed under the Companies Act, 1862, or companies

(1) Not reported.
(2) [1893] 3 Ch. 437; [1894] 2 Ch. 286.
(3) [1892] 2 Ch. 362.
(4) L. R. 2 Ch. 201.

created by special Act of Parliament. In this particular case, if the old limited company were still subsisting, the holders of its debentures would not be entitled to a receiver and manager or to a sale of the tramways and undertaking; and it is unnecessary to go through the special Act to shew that it contains nothing to confer such rights upon them. Nobody contended that it did. The argument for the appellants assumed that the debenture-holders had such rights against the limited company, and it was contended that they had not been deprived of those rights by the special Act. This argument falls to the ground if the assumption on which it is based is unsound, as we hold it to be. The appeal must be dismissed with costs.

Solicitors: *Spencer Whitehead; Munns & Longden.*

W. L. C.

CHITTY J.
1895
May 1.

In re CROWTHER.
MIDGLEY *v.* CROWTHER.

[1894 C. 2184.]

Trust for Sale—Power to Postpone—Direction as to Interim Income—Power to carry on Business—Discretion of Trustees—Profits of Business pending Sale—Capital or Income.

A testator devised and bequeathed his real and personal estate, which included his business, upon trusts for sale and conversion, the proceeds to be invested and to be held upon trust for his wife for life, and afterwards for his children. The will contained a power to postpone the sale, with the usual direction that the income until sale should be paid to the same persons and in the same manner as the income of the trust estate. The trustees carried on the testator's business for twenty-two years, not with a view to a sale, but for the benefit of the widow, to whom the whole of the profits were paid as income:—

Held, that the absolute discretion given to the trustees to postpone the sale involved a power to carry on the business during the period of postponement; that the trustees were justified in carrying on the business as they had done, and that the whole of the profits of the business had been properly paid to the tenant for life.

In re Chancellor (26 Ch. D. 42) discussed.

ACTION.

Joseph Crowther, rope and twine manufacturer and shopkeeper, who died in November, 1872, devised and bequeathed his real and personal estate to his wife Mary Crowther and his son, the defendant, Thomas Crowther, upon trust for sale and conversion, the proceeds to be invested and held upon trust for his wife for life, and after her death for his children at twenty-one or marriage. The testator declared and directed that, notwithstanding the trusts thereinbefore contained, his said son, the defendant Thomas Crowther, should have the option of purchasing the stock-in-trade of his, the testator's, businesses of a twine manufacturer and shopkeeper, or either of them, and also all or any part of his real estate, at a valuation to be made in manner therein mentioned, and he empowered his trustees to postpone or delay the sale of his said real estate, and the conversion of his personal estate, or any part thereof respectively,

"for such period as to them shall seem expedient," and directed that until such sale and conversion "the income arising therefrom shall from the time of my decease belong to and be received by the person or persons who would be entitled under the trusts hereinbefore contained to the moneys arising from such sale and conversion, or the income arising therefrom (as the case may require), if such sale and conversion had actually taken place." The testator appointed his wife and his son, the defendant Thomas Crowther, trustees and executors of his will.

The rope and twine manufacturing business had been carried on by the testator in partnership with his son, the defendant Thomas Crowther, as partners in equal shares; the shopkeeping business had been carried on by the testator alone. The testator left his widow and four children surviving him, and after his death the widow and the defendant Thomas Crowther carried on both the businesses till January, 1894, when the widow died; and during this period the whole of the profits of the shopkeeping business and a moiety of the rope and twine manufacturing business were treated by the widow and the defendant Thomas Crowther as income arising from the testator's estate and paid to the widow. The defendant Thomas Crowther never exercised his option to purchase either of the businesses.

In June, 1894, this action was commenced against the defendant Thomas Crowther and the representatives of the widow by a grandchild of the testator, claiming a declaration that the businesses ought to have been sold within a reasonable time after the testator's death; a declaration that the defendants were liable to account for the profits and to make good any loss that might have occurred through the breach of trust; administration, and other relief.

The action now came on for trial on motion for judgment on admissions, the question as to the legality of the trading by the trustees and executors being, by consent, treated as one of construction of the will; but the only point argued which calls for any notice in this report was whether the power to postpone the conversion of the testator's estate authorized the executors and trustees to carry on the business indefinitely for the benefit of the widow, the tenant for life.

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It was admitted that no attempt had been made to sell the businesses, and that they had been carried on at considerable profit, not with a view to a sale, but for the benefit of the widow.

Byrne, Q.C., and *Tanner*, for the plaintiff. The trustees were not justified in carrying on these businesses for nearly twenty-two years, and paying to the tenant for life the whole of the profits derived therefrom. These profits, less 4 per cent., ought to be brought into account as part of the capital of the testator's estate. A power to postpone the conversion of the estate is only meant to cover a reasonable delay in selling, such a delay as was allowed in *In re Chancellor*. (1) The Court imposes some limit on the trustees' apparently unlimited discretion in clauses of this kind. It is admitted here that the businesses were not carried on with a view to a sale, but to make profits for the widow; to authorize trustees to carry on business in this way an express power to carry on the testator's business is necessary: *Kirkman* v. *Booth*. (2) The discretion given to the trustees by such a clause as this must be exercised for the benefit of all persons interested under the will, and not solely for the benefit of the tenant for life. There is a great difference between a power to postpone conversion and a power to carry on.

Farwell, Q.C., and *J. G. Wood*, for the defendants. In *In re Chancellor* (1) all the Lords Justices say that a power to postpone involves or implies a power to carry on the business in the meantime, and there is nothing in that case which says that carrying on business for more than two years is unreasonable. Why should the Court insert any words of limitation in an unlimited power, and say that it only allows the business to be carried on "for a reasonable time" or "with a view to a sale"? A power to postpone is generally for the benefit of all persons interested: the postponement in this case certainly was; on a postponement the words of the will give the income of the unconverted estate to the tenant for life.

In *Kirkman* v. *Booth* (2) there was no power to carry on business. *In re Norrington* (3) shews that an absolute discretion like this will not be limited or interfered with by the Court.

(1) 26 Ch. D. 42. (2) 11 Beav. 273. (3) 13 Ch. D. 654.

What the trustees did here was authorized by the will, there has been no breach of trust committed, and the widow has properly received the whole of the income.

Byrne, in reply. The question is, where a testator uses general words of postponement of conversion, and makes no reference to carrying on his business, does he mean anything more than to empower his trustees to carry on his business with a view to a subsequent, and possibly more advantageous, sale? A power to postpone conversion has never yet been considered equivalent to a power to carry on business indefinitely in the way these trustees did.

CHITTY J. (after shortly stating the facts as to the carrying on of the business, and the commencement of this action, continued) :—The only point now raised by the plaintiff relates to the profits of these businesses—for it is admitted that there were profits—the contention of the plaintiff being that the profits, less 4 per cent., ought to be brought into account as part of the capital of the testator's estate ; and the question I have to decide is whether, on the construction of this will, the executors and trustees were authorized in carrying on these businesses as they did for a period of nearly twenty-two years, until the death of the widow, when the estate became distributable.

After the usual trusts for conversion and investment, the testator gives his son, the defendant Thomas Crowther, an option to purchase either of these businesses—an option which was never exercised during these twenty-two years ; then he empowers his trustees—and it is upon this power that the question turns—to postpone the sale and conversion of his estate or any part thereof "for such period as to them shall seem expedient" ; and he directs, that until such sale, the income arising therefrom—the material words are—"shall belong to the person who would be entitled under the trust hereinbefore contained to the moneys arising from such sale and conversion, or the income arising therefrom, if such sale and conversion had actually taken place." It is said by the plaintiff that the trustees have committed a breach of trust in carrying on these businesses under this power,

CHITTY J. 1895 *In re* CROWTHER. MIDGLEY *v.* CROWTHER.

though it is not suggested that any loss to the estate has been thereby occasioned; and it has been argued that this power to postpone conversion does not mean, as the testator says, that these trustees may postpone "for such period as to them shall seem expedient," but that some limitation must be imposed on this period—a limitation arising out of some artificial rule, said to have been laid down by the Court of Chancery, which, according to the plaintiff's argument, is that the trustees may postpone for such period as they deem expedient, "provided such postponement is only made with a view to a subsequent sale," or something to that effect. It seems extraordinary that there should be any such arbitrary rule inserting additional words in a power so express in its terms as this one, and restraining the testator's own words; and I have been searching in vain to see if any such limitation can be extracted from the authorities, and have failed to find it. If a testator says, "I empower my trustees to postpone the conversion of my estate for as long as they shall deem it expedient so to do," why is the Court to say that such a clause only authorizes a short postponement, and then only with a view to a sale at the end of some two or three years?

Executors have in all cases a year in which to realise their estate, and can always, even without any special power, postpone its conversion for a comparatively short time beyond this year, with a view to a more advantageous sale; and yet this is practically the result of this special power according to the plaintiff. When the estate becomes divisible, the power to postpone ceases, and comes to an end of itself; but when the power is existing, why such a power is not to be read so as to justify trustees in carrying on the testator's business, if they think right so to do, I am at a loss to understand.

I take it that a power to postpone the sale of a business involves a power of continuing the business in the meantime. That was Fry L.J.'s opinion in *In re Chancellor* (1); and Cotton L.J. in his judgment (at p. 46) says: "Without impugning any of the authorities that have been referred to, there is in this will an implied authority to the trustee to carry on the business, and the testator has said how the profits of the business pending a sale are

(1) 26 Ch. D. 47.

to be paid and applied." That applies to the present case. So long as the trustees carry on the business under this implied power, the language of the will is unmistakable, the income or yearly profit derived from the businesses is income for all the purposes of the will, and passes under the words of the will to the tenant for life. To hold that the discretion of the trustees is limited in the way suggested by the plaintiff would be tantamount to inserting in this will words which are not there, and to say that the trustees were not justified under this power in carrying on these businesses would be to invent a trap to catch unwary trustees.

For myself, I cannot see, if a testator says his trustees may postpone the sale for as long as they deem it expedient, how this gives them only some undefined and limited power of postponement; and there is nothing in any of the authorities that have been cited which compels me to come to such a conclusion. *In re Chancellor* (1) does not in any way conflict with the conclusion at which I have arrived—indeed, some of the observations of the Lords Justices are quite opposed to the plaintiff's contention. In that case it was only necessary to decide whether the postponement of the sale of the business for some two years with a view to its sale as a going concern was justified, and the Court of Appeal held that it was, and that the profits belonged to the tenant for life. I think it is unnecessary for me to consider in detail the other authorities that have been cited.

In my opinion the trustees here were justified in carrying on these businesses; the whole of the income until sale has been properly received by the tenant for life; and the plaintiff's contention therefore fails.

Solicitors: *Elliott & Ash, for W. H. Steward, Birstal; Flower, Nussey & Fellowes, for Carr & Cadman, Gomersal.*

(1) 26 Ch. D. 42.

W. C. D.

NORTH J.
1895
March 29.

DICKSON *v.* LAW AND DAVIDSON.

[1894 D. 1601.]

Practice—Service of Writ out of Jurisdiction—Irregularity—Setting aside Service—Rules of Supreme Court, 1883, *Order* XI., *rr.* 1, 4; *Order* II., *r.* 5; *Order* LXX., *r.* 1; *Appendix A, Part I., Form No.* 5.

A writ was issued against and served upon a sole defendant, who was within the jurisdiction. He applied for leave to issue a third party notice against D., who was out of the jurisdiction. On the hearing of this application the judge directed that D. should be added as a defendant, and gave the plaintiff leave to add D. and to amend the writ, and to serve the amended writ upon D. out of the jurisdiction. No affidavit had been made, as required by rule 4 of Order XI., that the plaintiff had a good cause of action, &c. The amended writ was served on D. out of the jurisdiction, but it did not bear the indorsement, prescribed by Form No. 5 in Appendix A to the Rules of the Supreme Court, for a writ to be served out of the jurisdiction:—

Held, that these omissions were mere irregularities and not matters of substance, and that they did not entitle D. to have the amended writ and the service thereof upon him set aside.

MOTION by the defendant Davidson that an order in the action dated November 26, 1894, made by North J. at chambers, whereby liberty was given to serve the amended writ of summons in the action on the defendant Davidson at Colombo, in Ceylon, out of the jurisdiction, might be discharged, or that, in the alternative, the amended writ and the service thereof upon the defendant, and all subsequent proceedings in the action, might be set aside, on the grounds (1.) that the application for the order was not supported by the evidence required by Order XI., r. 4, of the Rules of the Supreme Court, and (2.) that the amended writ of summons was not in the form required by Order II., r. 5.

The action was commenced in August, 1894, against the defendant Law alone.

By the writ the plaintiff claimed a declaration that the defendant was a trustee for the plaintiff of one-sixteenth share of and in certain freehold hereditaments in Ceylon. The plaintiff also claimed to have the provisions of an agreement dated December 24, 1886, and entered into between the plaintiff and

the defendant and two other persons, namely, L. F. Davidson and C. Hendry, carried into effect by the defendant, and some other relief.

The agreement was entered into in Ceylon.

The defendant Law, who was in England, applied for leave to serve a third party notice upon Davidson, and filed affidavits in support of his application, in which he said that he claimed to be indemnified by Davidson against all liability in respect of the plaintiff's claim upon grounds which he stated.

Upon the hearing of this application North J. made the order which it was now sought to discharge, giving the plaintiff leave to add Davidson as a defendant, and to amend the writ, and to serve the amended writ upon Davidson out of the jurisdiction. No affidavit was made as required by rule 4 of Order XI., stating that in the belief of the deponent the plaintiff had a good cause of action, &c.

In pursuance of this order the amended writ was served upon Davidson in Ceylon. The writ so served did not, as required by rule 5 of Order II. and Form No. 5 in Appendix A to the Rules of the Supreme Court, contain the "indorsement to be made on the writ before the issue thereof."

Davidson by leave entered a conditional appearance, without prejudice to his right to set aside the writ on the ground of irregularity. He then served the above notice of motion.

Vernon Smith, Q.C., and *à Beckett Terrell*, for the motion. Davidson is not a "necessary or proper party" to the action against Law within the meaning of Order XI., r. 1 (*g*). (1) At any

(1) By Order XI., r. 1, "Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the Court or a judge whenever (inter alia)—

"(*g*.) Any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction."

By rule 4, "Every application for leave to serve such writ or notice on a defendant out of the jurisdiction shall be supported by affidavit or other evidence, stating that in the belief of the deponent the plaintiff has a good cause of action, and shewing in what place or country such defendant is or probably may be found, and whether such defendant is a British subject or not, and the grounds upon which the application is made. . . ."

By Order II., r. 4, "No writ of summons for service out of the jurisdiction, or of which notice is to be

NORTH J. 1895 DICKSON v. LAW AND DAVIDSON.

rate, rule 4 has not been complied with, there being no affidavit that the plaintiff has a good cause of action, &c. On the ground of this irregularity the amended writ and the service on Davidson ought to be set aside. The action relates to land in Ceylon, and the question would be more conveniently tried there: *Kinahan* v. *Kinahan.* (1)

Moreover, the amended writ was irregular and ought to be set aside, because it had not upon it the indorsement prescribed by rule 5 of Order II., and the forms in Appendix A, for a writ for service out of the jurisdiction: *Sedgwick* v. *Yedras Mining Co.* (2); *Société Industrialle* v. *Companhia Portugueza* (3); *Keate* v. *Phillips.* (4) This indorsement ought to have been added to the amended writ, but no leave was asked, or was given, to add it.

In *Phillipson* v. *Emanuel* (5) the person serving a writ did not, though requested so to do, shew the original writ to the defendant, and it was held that all the proceedings taken under the writ must be set aside, whether they were to be considered as only irregular or as absolutely void.

Everitt, Q.C., and *Leck*, for the plaintiff. There is no substance in the technical objections. The amended writ having been served abroad in pursuance of the leave given by the Court, the omissions of the affidavit and of the indorsement are mere irregularities, which, under rule 1 of Order LXX., do not render the proceedings void, unless the Court so directs. In the cases in which writs have been set aside, and service and other proceedings held to be invalid, the defects were matters of substance. For instance, if

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given out of the jurisdiction, shall be issued without the leave of a court or a judge."

By rule 5, "A writ of summons to be served out of the jurisdiction, or of which notice is to be given out of the jurisdiction, shall be in one of the Forms Nos. 5, 6, 7, and 8 in Appendix A, Part I., with such variations as circumstances may require. . . ."

The Forms Nos. 5, 6, 7, and 8 all contain the following—

"*Indorsement to be made on the writ before the issue thereof.*

"N.B.—This writ is to be used where the defendant or all the defendants or one or more defendant or defendants is or are out of the jurisdiction. When the defendant to be served is not a British subject, and is not in British dominions, notice of the writ, and not the writ itself, is to be served upon him."

(1) 45 Ch. D. 78.
(2) 35 W. R. 780.
(3) W. N. (1889) 32.
(4) W. N. (1878) 186.
(5) 56 L. T. (N.S.) 858.

an original writ is not produced when a defendant is served, non constat that any writ exists. In *Keate* v. *Phillips* (1) the writ had been issued without the leave of the Court. There is enough to shew the Court that the plaintiff has a good cause of action against Davidson, and that Davidson is a proper party to the action.

Howland Jackson, for the defendant Law.

Vernon Smith, Q.C., in reply.

NORTH, J. I do not think I ought to set aside the amended writ or the service upon the defendant Davidson, though no doubt the indorsement in question ought to have been placed upon the writ before it was served upon him. Upon the merits, I think that Davidson ought to be a party to the action. I do not recollect now who made the suggestion in the first instance, but it is quite clear that, when the application for leave to serve a third party notice upon Davidson was before me, all parties concurred that the best course would be to add him as a defendant. I am satisfied that in substance the order was right.

But two technical objections have been made to the order. The first is that there was no formal affidavit stating that, in the belief of the deponent, the plaintiff has a good cause of action, &c. It was decided in *Fowler* v. *Barstow* (2) that, when the defendant is resident in the Queen's dominions, the omission in the plaintiff's affidavit of the statement that he is a British subject is immaterial. And so, I think, when there is enough to satisfy the Court that the plaintiff has a good cause of action, the absence of a formal affidavit to that effect is not a matter of substance; and though, if my attention had been directed to the point when I made the order, I should have required such an affidavit to be made, I do not think I am bound by reason of its absence now to set aside the service of the writ.

The second objection is that the amended writ did not bear the indorsement which is prescribed by Form No. 5 for a writ which is to be served out of the jurisdiction. Strictly speaking, the present case does not come within the words of Form 5, because it says that the indorsement is to be made on the writ

(1) W. N. (1878) 186. (2) 20 Ch. D. 240.

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"*before* the issue thereof," and here the writ, as originally issued, was not intended for service out of the jurisdiction. Still, I think that the amended writ ought not to have been served without the indorsement. But, the writ having been in fact served without it, the question is whether the defendant is now entitled to take advantage of the slip which has been made, no harm having been done to him by reason of it. In my opinion, he is not entitled to do so, and I think rule 1 of Order LXX. enables me to treat the service as valid, notwithstanding the irregularity. The service must, therefore, stand good, and the motion must be refused with costs.

Solicitors: *Fladgate & Co.; Lowless & Co.*

W. L. C.

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In re A SOLICITOR.

[1892 W. 1393.]

Attachment—Solicitor—Default in Payment of Money in Character of Officer of Court—Costs of Taxation of Bill—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 4, *sub-s.* 4.

An order for the taxation of a solicitor's bill, the amount of which he had retained out of money belonging to his client, directed that, in case it should appear that the bill was overpaid, the solicitor should, within four days after service of the order and of the taxing master's certificate, repay to the client the amount certified to be overpaid. The costs of the taxation were reserved. The taxing master found that the bill had been overpaid. By a subsequent order it was directed that the solicitor should pay the taxed costs of the taxation of the bill:—

Held, that the costs of the taxation, as well as the amount found due from the solicitor upon the taxation, were within the exception of sub-s. 4 of s. 4 of the Debtors Act, 1869, as being due from him "in his character of an officer of the Court," and that he could be attached for his default in payment of both.

MOTION by a client that a writ of attachment might issue against a solicitor, or that he might be committed to prison, for disobedience to two orders dated respectively May 6 and August 8, 1892, in neglecting to pay to the applicant two sums respectively of 20*l.* 17*s.* 5*d.* and 25*l.* 12*s.* 2*d.*

The solicitor had acted for the applicant, and on May 6, 1892, an order was made on her application for the taxation of the bill of costs, amounting to 52*l.* 16*s.* 7*d.*, delivered by him to the applicant, and paid by her to him in October, 1891. The solicitor had retained that amount out of moneys which he had received for the client. The order directed that, in case it should appear that the bill was overpaid, the master should certify the amount overpaid, and that in such case the solicitor should, within four days after service of the order and of the taxing master's certificate to be made in pursuance thereof, repay to the applicant the amount certified to be overpaid. The costs of the application and of the reference were reserved.

On July 26, 1892, the taxing master made his certificate, finding that the bill had been overpaid by the sum of 20*l.* 17*s.* 5*d.*

On August 8, 1892, upon the client's application, an order was made referring it to the taxing master to tax her costs of the matter, including the taxation and that application, and that the solicitor should pay to her the amount of her said costs when so taxed.

On January 21, 1895, the taxing master made his certificate under this order, taxing the costs thereby directed to be taxed at the sum of 25*l.* 12*s.* 2*d.*

The orders and certificates were duly served upon the solicitor, but he failed to pay the amounts.

R. F. Norton, for the client. The sum found due from the solicitor on the taxation of the bill is within the exception from the abolition of imprisonment for debt contained in sub-s. 4 (1) of s. 4 of the Debtors Act, 1869: *In re Rush.* (2) It is contended that the costs of the taxation are also due from the solicitor "in his character of an officer of the Court." There is no actual decision to that effect. In *In re Hope* (3) it was held that the costs of a solicitor's unsuccessful appeal against the refusal of Lord Romilly M.R. to discharge an order for the taxation

(1) Sect. 4, sub-s. 4: "Default by an attorney or solicitor in payment of costs when ordered to pay costs for misconduct as such, or in payment of a sum of money when ordered to pay the same in his character of an officer of the Court making the order."

(2) L. R. 9 Eq. 147.

(3) L. R. 7 Ch. 523.

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of his bill were not within sub-s. 4, and that he could not be attached for his default in paying those costs, because, as the Lords Justices held, he had been ordered to pay the costs "simply as an unsuccessful litigant," and was "to be treated in the same way as any other person under default in payment of costs." But Mellish L.J. said: "I do not say that if a solicitor in his character of a solicitor were ordered to pay a sum of money with costs, he would not be liable to be imprisoned for non-payment of the costs as well as of the original sum recovered." And James L.J. added: "I agree that in the case supposed of a solicitor being ordered in his character of solicitor to pay a sum of money with costs, the costs would be considered as included in the sum ordered to be paid." Those observations apply to the present case, and justify the Court in now holding that the attachment may issue in respect of the costs of the taxation of the bill as well as in respect of the sum found due from the solicitor upon the taxation. The actual decision in *In re Hope* (1) does not apply to the present case.

The solicitor did not appear.

NORTH J. In my opinion, having regard to what was said by the Lords Justices in *In re Hope*, (1) the costs of the taxation stand in the same position as the sum found due from the solicitor upon the taxation. It does not appear how the earlier costs had been dealt with in *In re Hope* (1), but the application to attach the solicitor was made on the ground of his default in paying the costs of his unsuccessful appeal against the refusal to discharge an order for the taxation of his bill. The Lords Justices held that those costs were due from him, not in his character of solicitor, but as an unsuccessful litigant, and that therefore he could not be attached for his default in not paying them. But at the same time the Lords Justices made the observations which have been quoted, and which appear to me to apply to the present case. In this case the order for the taxation of the bill reserved the costs of the taxation, for it might have turned out upon the taxation that something was due to the solicitor, instead of from him. But, when it was found that a balance was

(1) L. R. 7 Ch. 523.

due from the solicitor to the client, I think it necessarily followed that the client was entitled to the costs of the taxation; as an order for the payment of those costs by the solicitor would have been made in the first instance if it had been clear that upon the taxation the balance would be found against the solicitor. If the original order had been for the payment of the balance by the solicitor together with the costs of the taxation, the observations of the Lords Justices in *In re Hope* (1) would have exactly applied, and the two orders amount in substance to the same thing. The attachment may therefore issue in respect of both amounts.

Solicitors for client: *Edmonds & Jubb.*

W. L. C.

MARA *v.* BROWNE.

[1890 M. 3191.]

Trustee—Breach of Trust—Statute of Limitations—Consent of Tenant for Life—Impounding Life Interest—Solicitor Party to Breach of Trust—Liability of Partner—Trustee Act, 1888 (51 & 52 *Vict. c.* 59), *ss.* 6, 8—*Trustee Act*, 1893 (56 & 57 *Vict. c.* 53), *s.* 45.

By a marriage settlement made in 1875, money of the wife was vested in trustees upon trust to pay the income to her during the joint lives of herself and her husband for her separate use without power of anticipation, and after her death, in case he should survive her, to pay the income to him during his life, and after the death of the survivor to hold the trust funds upon trust for the children of the marriage. No express life estate was given to the wife in case she should survive her husband.

The husband died in 1885, and in 1890 the wife and her infant children commenced an action for breaches of trust committed in 1884, to which the defendants set up the defence of the Statute of Limitations under s. 8, sub-s. 1 (*b*), of the Trustee Act, 1888:—

Held, that the wife took by resulting trust an estate for her life in remainder, which was a different estate from the estate for the joint lives limited to her by the settlement; that the life estate did not become an interest in possession until the death of the husband; and that, consequently, the statute did not begin to run against the wife till then, and was not a bar to her action.

The settlement empowered the trustees to vary the investments of the trust funds, with the consent in writing of the wife during her life. It

(1) L. R. 7 Ch. 523.

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having been arranged that the original trustees of the settlement should retire, and new trustees be appointed, one of the old trustees took to the securities on which the trust funds were invested, and paid the moneys into a bank to an account opened in the joint names of himself and one of the proposed new trustees. The moneys afterwards came into the hands of a solicitor, who was acting for the husband and wife and the proposed new trustees, and he, before the appointment of the new trustees had been made, and without any communication with the old trustees, advanced the moneys upon mortgages of building land in the names of the proposed new trustees. The mortgages were, as the Court held, improper securities for trust funds, and they resulted in a loss. After the mortgages had been made, a deed appointing the new trustees was executed by the husband and wife, and in this deed the mortgages were referred to as constituting securities for the trust funds. The wife consented in writing to two of the mortgages, but there was nothing to shew that she knew that they constituted a breach of trust.

The wife and her infant children brought an action against the solicitor and his partner to compel them to make good the loss occasioned by the improper investment of the trust moneys:—

Held, that the solicitor was liable, as if he had actually been a trustee of the settlement, to make good the loss:

Held, also, that, having regard to the evidence, the solicitor was in making the advances acting on behalf of his firm, and that the defendants were jointly and severally liable to make good the loss:

Held, further, that the life estate of the wife could not be impounded, under s. 6 of the Trustee Act, 1888, or s. 45 of the Trustee Act, 1893, by way of indemnity to the defendants.

TRIAL of an action the object of which was to obtain a declaration that the defendants, Hugh Browne and Arthur Browne, were jointly and severally liable to make good a loss which had resulted from improper investments of trust moneys, subject to the trusts of a settlement, dated August 30, 1875, and made upon the marriage of the plaintiff Ellen Jane Mara (then Miss Ellen Jane Walker) with her first husband, Harold Reeves, who died on April 17, 1885. Mrs. Reeves after his death married W. P. Mara. There were only two children of the first marriage, both of whom were infants. They were co-plaintiffs, by Mr. Mara as their next friend. The other co-plaintiffs were Arthur Robert Reeves and Marian Reeves, respectively a brother and a sister of Harold Reeves, they being the then present trustees of the settlement.

The defendants were brothers, who at the time of the transactions in question were carrying on business as solicitors in

partnership, under the style of Michael Browne & Sons. Their father, Michael Browne, had formerly been in partnership with them, but he had retired from the firm before the transactions in question. He was originally made a co-defendant, but he died before the trial, and the action was not revived against his representatives.

By the settlement property of the wife worth about 5000*l.* was vested in James Walker and Bernard Edwin James as trustees, upon trust after the solemnization of the marriage to permit the existing investments to remain unaltered, or, with the consent in writing of the wife during her life, and afterwards at their discretion, to convert the same, and invest the proceeds in their names in any of the stocks or funds or Government securities of the United Kingdom, or upon freehold, copyhold, leasehold, or chattel real securities in England, Wales, or Ireland, or upon other securities therein mentioned, with power from time to time, with such consent or at such discretion as aforesaid, to vary the investments, and to pay the income of the trust funds to the wife during the joint lives of herself and Harold Reeves, for her separate use without power of anticipation, and after her death, if he should survive her, to him for his life, determinable as therein mentioned; and after the death of the survivor of the husband and wife or the sooner determination of his interest, the trustees were to hold the trust funds in trust for the children or remoter issue of the marriage as the wife should appoint, and in default of appointment for the children of the marriage who should attain twenty-one, or if daughters marry under that age. And if there should be no child who should acquire a vested interest the trustees were to hold the funds upon such trusts as the wife should by will appoint; and, in default of appointment, then, in the events which had happened, for the wife absolutely. The deed also provided for the settlement upon similar trusts of property to which the wife, or her husband in her right, might become entitled during the coverture. Under this latter provision large additional sums were received by the trustees of the settlement.

James Walker was a brother of Mrs. Reeves. He never took any active part in the management of the trust funds, which

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was left entirely in the hands of the other trustee, B. E. James, who was a solicitor. In 1878 Mr. and Mrs. Reeves made the acquaintance of the defendant Hugh Browne, and became very intimate with him; and in 1883 Reeves consulted Hugh Browne about his wife's fortune and the position occupied by James, as to whose conduct some suspicions had arisen. Hugh Browne suggested that James Walker should be asked to retire from the trust, and that a new trustee should be appointed in his place. Arthur Reeves was asked to be the new trustee, and he consented, conditionally upon being informed as to his responsibilities. A deed was prepared for the purpose by Hugh Browne, but it was never completed. It was suspected that some of the securities upon which James had invested the trust moneys were worthless, and he was pressed to take to the securities himself, and to pay over the trust moneys which he had thus invested. Ultimately the whole of those moneys were paid by him into a bank called Yates' Bank to an account which was opened in the joint names of B. E. James and Arthur Reeves. James agreed to retire. The appointment of Arthur Reeves and his sister Marian Reeves as trustees of the settlement was not actually made till May 9, 1884, when a deed for that purpose was executed by Mr. and Mrs. Reeves, James and Walker (the original trustees, who retired); and Arthur Reeves and Marian Reeves, the new trustees who were then appointed.

Meanwhile a large part of the trust moneys had been advanced upon the securities which were alleged to be improper. These securities consisted of mortgages of freehold or leasehold building land, upon which in some cases houses had been erected, and in others only partially erected at the dates of the respective mortgages. In no case were the houses completed or let: nor had any proper valuations been obtained.

Eight mortgages were by the statement of claim alleged, and were held by the Court, to have been improper investments, namely:—

(1.) A mortgage dated February 20, 1884, by H. J. Osborne of a plot of freehold land for 1600*l.*

(2.) A mortgage dated February 20, 1884, by W. T. Cordon of a plot of leasehold land for 1200*l.*

(3.) A mortgage dated February 27, 1884, by H. J. Osborne of a plot of freehold land for 1600*l.*

(4.) A mortgage dated March 10, 1884, by W. T. Cordon of a plot of leasehold land for 1500*l.*

(5.) A mortgage dated March 14, 1884, by J. Price and H. J. Price of a plot of freehold land for 1000*l.*

(6.) A mortgage dated March 14, 1884, by J. Price and H. J. Price of a plot of freehold land for 750*l.*

(7.) Another mortgage dated March 14, 1884, by J. Price and H. J. Price of a plot of freehold land for 750*l.*

(8.) A mortgage dated March 9, 1884, by H. J. Osborne of a plot of freehold land for 800*l.*

The total amount thus advanced was 9200*l.* Upon each of the mortgages the rate of interest was 6 per cent., reducible on punctual payment to 5 per cent. The securities proved insufficient. The mortgages were all dated before the actual appointment of the new trustees, but the names of those trustees were inserted as the mortgagees.

In a schedule to the deed of appointment of new trustees the eight mortgages were set forth as securities upon which the trust funds were in part invested, and upon the completion of the appointment the balance standing to the credit of the joint account in the bank was transferred into the names of the new trustees.

The mortgages were accepted under the advice and at the suggestion of the defendant Hugh Browne, who had the principal management of the business, the defendant Arthur Browne having no personal knowledge of the greater part of it. Hugh Browne was acting also as solicitor for the mortgagors.

The old trustees were not in any case consulted or informed about the mortgages.

The moneys for the purpose of making the advances were sent to the firm of Michael Browne & Sons, and the receipt of them was acknowledged in the name of that firm; but the moneys in fact came into the hands of Hugh Browne, and were paid by him into his own banking account. He then made the advances to the mortgagors. In some cases he had himself in the first instance advanced part of the mortgage money to the mortgagor

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on the security of the mortgaged property, and in those cases he retained the amount which he had advanced out of the trust moneys when they came into his hands. The whole of the mortgage money was not in every case paid to the mortgagor at once, but the money was paid to him in instalments from time to time as the buildings upon the mortgaged land proceeded. The costs of the mortgages were retained on behalf of the firm of Michael Browne & Sons out of the respective mortgage moneys. A sum of 100*l.* was also paid to that firm by Harold and Arthur Reeves for the costs incident to the appointment of the new trustees. Mrs. Reeves signed one consent in writing to the advances upon the first two of the mortgages, but there was nothing to shew that she was aware that the mortgages constituted a breach of trust.

Other advances of parts of the trust moneys were made to persons named Evans and Woodcock, Carver, Williams, and Bottomore, but no complaint as to those advances was made in this action.

The effect of the evidence is stated in the judgment of the Court.

Cozens-Hardy, Q.C., Byrne, Q.C., and *C. E. E. Jenkins,* for the plaintiffs. At a time when there were practically no trustees of the settlement, the defendant Hugh Browne took upon himself the management of the trust and invested a large part of the funds in improper securities. He thus constituted himself a constructive trustee, and is therefore liable to make good the loss. The trust money was received by his firm as solicitors in a transaction within the scope of a solicitor's business, and therefore his partner, the defendant Arthur Browne, is also liable: *Blyth* v. *Fladgate.* (1)

Swinfen Eady, Q.C., and *Boome,* for the defendant Arthur Browne. Assuming that Hugh Browne did intermeddle with the trust in such a way as to make himself personally liable, he was not in so doing acting within his authority as partner, and Arthur Browne is not liable for his acts. This case differs from *Blyth* v. *Fladgate* (1) in that, here the money was never under

(1) [1891] 1 Ch. 337.

the control of the firm, and there were existing trustees of the settlement. Any remedy against the firm for negligence is barred by lapse of time. The acts of Hugh Browne in helping to carry out the investments did not make him a trustee de son tort: *In re Barney* (1); *Barnes* v. *Addy* (2); *In re Spencer*. (3)

If the infant plaintiffs have any remedy against the defendants, their mother stands in a different position: her remedy is barred under s. 8, sub-s. 1 (*b*), of the Trustee Act, 1888. (4)

(1) [1892] 2 Ch. 265.

(2) L. R. 9 Ch. 244.

(3) 51 L. J. (Ch.) 271.

(4) The Trustee Act, 1888, was passed on December 24, 1888.

By s. 6; "(1.) Where a trustee shall have committed a breach of trust at the instigation or request or with the consent in writing of a beneficiary, the Court may, if it shall think fit, and notwithstanding that the beneficiary may be a married woman entitled for her separate use, whether with or without a restraint upon anticipation, make such order as to the Court shall seem just for impounding all or any part of the interest of the beneficiary in the trust estate by way of indemnity to the trustee or person claiming through him."

"(2.) This section shall apply to breaches of trust committed as well before as after the passing of this Act, except where an action or other proceeding shall be pending with reference thereto at the passing of this Act."

Sect. 8: "(1.) (*a*) All rights and privileges conferred by any Statute of Limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through him."

"(*b*) If the action or other proceeding is brought to recover money or other property, and is one to which no existing Statute of Limitations applies, the trustee or person claiming through him shall be entitled to the benefit of and be at liberty to plead the lapse of time as a bar to such action or other proceeding in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received, but so nevertheless that the statute shall run against a married woman entitled in possession for her separate use, whether with or without a restraint upon anticipation, but shall not begin to run against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession."

Sect. 6 of the Trustee Act, 1888, was repealed by the Trustee Act, 1893, and by s. 45 of the latter Act—

"(1.) Where a trustee commits a breach of trust at the instigation or request or with the consent in writing of a beneficiary, the High Court may, if it thinks fit, and notwithstanding that the beneficiary may be a married woman entitled for her separate use and restrained from anticipation, make such order as to the Court seems just, for impounding all or any part of the interest of the beneficiary in the trust estate by way of indemnity to the trustee or person claiming through him."

"(2.) This section shall apply to breaches of trust committed as well

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The statute began to run in 1884. The life estate which Mrs. Mara took by implication on the death of her husband was not a different estate from the interest which she had under the settlement during the joint lives of herself and her husband, so as to make the statute begin to run afresh on his death. The effect of the settlement is the same as if an express life estate had been given to her during her life, and she had been restrained from anticipation during coverture. It would have been different, if she had acquired a new interest through the death of a child.

Mrs. Mara assented to and acquiesced in, and indeed instigated, the breach of trust; and the defendants are entitled to have her life interest impounded under the Trustee Act, 1893, s. 45, which in substance re-enacts s. 6 of the Trustee Act, 1888: *In re Somerset.* (1)

A solicitor who acts only as an agent is not liable for the act of his principal: *Staniar* v. *Evans.* (2)

Upon the evidence it is clear that no part of the money came into the hands of the firm or under the control of Arthur Browne. The money was paid by means of cheques drawn to the order of Hugh Browne, and it went into his private account. Under such circumstances Arthur Browne cannot be held liable as a constructive trustee. Mrs. Mara herself admitted in her examination that she had always communicated with Hugh Browne, and that she knew nothing of Arthur Browne. Arthur Reeves must have known that the houses were unfinished.

The defendant *Hugh Browne*, in person. If the plaintiffs' contention is right, it must follow that, in every case in which in the ordinary course of business money passes through the hands of a solicitor from a mortgagee to a mortgagor, and any trust can be attached to the money, the solicitor can, during the minority of any cestui que trust and for six years afterwards, be made liable if the money has not been dealt with strictly in accordance with the trust; if, for instance, it has

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before as after the passing of this Act, but shall not apply so as to prejudice any question in an action or other proceeding which was pending on December 24, 1888, and is pending at the commencement of this Act."

(1) [1894] 1 Ch. 231.

(2) 34 Ch. D. 470, 478.

been advanced upon the security of unfinished houses. During an indefinite term the solicitor might be made liable as a constructive trustee. There would be no safety for any solicitor. *Blyth* v. *Fladgate* (1) was quite different from the present case. There the solicitor had invested trust money upon a security of which his own surveyor had reported unfavourably. The judgment was based entirely upon neglect, and did not depend upon constructive trust. *Barnes* v. *Addy* (2) is an authority to the contrary. There it was said that the solicitor had acted only ministerially. That is so here. In the absence of fraud a trustee's solicitor is responsible only to his own principal—that is, to the trustee: *In re Barney* (3); *Staniar* v. *Evans.* (4) I did nothing beyond that which is within the scope of a solicitor's agency: *Dooby* v. *Watson.* (5) The trust fund had been nearly destroyed by the acts of the former trustee, and, but for what I did, there would have been no trust fund at all.

C. E. E. Jenkins, in reply. The question is not one of mere value; the securities were in their nature improper for the investment of trust funds: *Learoyd* v. *Whiteley* (6); *Smethurst* v. *Hastings.* (7) Hugh Browne was not bound to accept any security he could get.

At the time when he accepted the securities in question, the trust money was safe in a bank in the names of B. E. James and Arthur Reeves. Hugh Browne says he wanted to get a security producing 5 per cent. interest.

The valuations which are relied upon are clearly worthless: they are simply certificates of work done in the building of the houses. It is essential that the person who is to make the valuation should know that the money which it is proposed to advance on the security is trust money. That rule was well settled before the Act of 1888, and it is involved in s. 4 of that Act. None of the valuers employed in this case was informed that the money was trust money. A solicitor who gets possession of trust money is liable for it as if he were a trustee: *Blyth* v. *Fladgate* (1); *Morgan* v. *Stephens* (8); *Soar* v *Ashwell.* (9)

(1) [1891] 1 Ch. 337.
(2) L. R. 9 Ch. 244.
(3) [1892] 2 Ch. 265.
(4) 34 Ch. D. 470.
(5) 39 Ch. D. 178.
(6) 12 App. Cas. 727.
(7) 30 Ch. D. 490.
(8) 3 Giff. 226.
(9) [1893] 2 Q. B. 390.

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The books of the firm shew that they received the money. At any rate, they received the costs. As the evidence stands, if Hugh Browne had drawn the money out of his private account and had applied it to his own purposes, and then the partners had become bankrupt, the cestuis que trust could have proved in the bankruptcy. If money is intrusted to a firm of solicitors for investment, and it is misapplied, all the partners are responsible, even though the money had been under the control of the one partner who had always acted for the cestui que trust.

The Statute of Limitations cannot affect the infant plaintiffs.

It is said that Mrs. Mara cannot maintain the action—(1.) because she knew what was being done; (2.) by reason of the Statute of Limitations. The evidence shews that she did not know all about the breach of trust. She did, in fact, give her written consent to two of the mortgages, but by the settlement that consent was required to a change of investment. The exercise of this power of consenting given by the settlement will not condone a breach of trust. In *Sawyer* v. *Sawyer* (1) there was no restraint upon anticipation. In order that (apart from the statute) a trustee may be able to say that a married woman is barred from complaining of a breach of trust, he must shew that she knew that she was being asked to condone a breach of trust, and not merely to consent to a change of investment, which she would have a right to assume was a proper one. There is nothing to affect Mrs. Mara with knowledge of a breach of trust.

(2.) As to s. 8, sub-s. 1 (*b*), of the Trustee Act, 1888, it has no application to Mrs. Mara, because her present life estate is a different estate from that which she had when the breaches of trust took place. Her first life estate during the joint lives of herself and her first husband was created by the settlement; her present life estate resulted to her by implication, and came into possession on the death of her husband in 1885; *Hunt* v. *Burn* (2); *Stowel* v. *Lord Zouch.* (3) That interest was reversionary during her first husband's lifetime, and could not be dealt with during the first coverture: *Whittle* v. *Henning.* (4) The expression "shall be an interest in possession," in s. 8,

(1) 28 Ch. D. 595.
(2) 2 Salk. 422.
(3) Plowd. 353 a, 368.
(4) 2 Ph. 731.

sub-s. 1 (*b*), includes interests coming into possession from time to time. The object is to give the cestui que trust six years as to every interest from the time when it comes into possession. It makes no difference whether there are estates in different persons or different estates in the same person at different times, or whether there are successive estates in the same person or an estate in another person is interposed between two estates in the same person. In the latter case the point would be perfectly clear.

As to impounding Mrs. Mara's life interest to recoup the defendants what they may be called upon to pay in respect of the breach of trust, s. 6 of the Act of 1888 does not confer any right upon the trustee; it only gives a discretionary power to the Court. At any rate, no more can be impounded than the income arising from the two mortgages to which Mrs. Mara consented.

[NORTH J. referred to *Raby* v. *Ridehalgh* (1).]

That case is immaterial, because the statute now extends to income which is subject to a restraint on anticipation.

But does s. 6 apply at all? The important words are, "where a trustee shall have committed a breach of trust," not "where a trustee shall have made an investment." In *In re Somerset* (2) it was clear that the cestui que trust had consented to the investment. It is not suggested here that there was any instigation by the plaintiff. What is relied on is one consent in writing and the appointment of new trustees. The appointment was executed after the investments were made. In order that the consent may be effectual, it must be given before the act is done; an ex post facto consent is not within either the words or the spirit of s. 6. The written consent was not given with a view to the Act of 1888, which had not then been passed, but by reason of the provisions of the settlement. The securities were in terms authorized by the power of investment; they were not improper per se, but because of the particular circumstances. The onus is upon the defendants to shew that Mrs. Mara knew all the material facts which made the investment a breach of trust. *Sawyer* v. *Sawyer* (3) is still good law; s. 6 does not

(1) 7 D. M. & G. 104. (2) [1894] 1 Ch. 231. (3) 28 Ch. D. 595.

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affect it. In that case there was not any restraint upon anticipation. Sect. 6 only extends the jurisdiction of the Court to a case in which a married woman is restrained from anticipation. *Sawyer* v. *Sawyer* (1) shews that a married woman stands in a better position than a man. It is not proved that Mrs. Mara really knew the circumstances which rendered these investments a breach of trust. In fact the defendants have always contended that the investments were not a breach of trust.

Even if there was a valid consent in writing by Mrs. Mara the case is not one for the exercise of the discretionary power of the Court.

The consent ought to shew on its face that the transaction in question was a breach of trust.

From the language of the consent no one could suppose that the houses were not completed.

Swinfen Eady, Q.C., in reply as to the new cases cited in reply by the plaintiffs' counsel. Cases upon the Statute of Limitations which relate to rights of entry upon land have no application to personal rights. In some of the cases there were different rights as regarded different estates: *Bourne* v. *Hunt* (2); *Doe* v. *Liversedge*. (3) If the interest given by the settlement to the wife had been for her life, with a restraint on anticipation during coverture, she would clearly have taken only one interest for her life, and the settlement should be rectified in that way.

At any rate, the wife has not two separate interests; her interest after the death of her husband is really a continuation of her former interest: *Tunstall* v. *Trappes*. (4)

The defendant *Hugh Browne* in reply. *Morgan* v. *Stephens* (5) is distinguishable; it was not a case of mere agency.

Cur. adv. vult.

1895. April 9. NORTH J. It will be noticed that there is no direction in the settlement how, in the event (which actually happened) of the death of the husband before the wife, the income is to be paid during the remainder of the wife's lifetime. Pro-

(1) 28 Ch. D. 595.
(2) 4 Bro. P. C. 66.
(3) 11 M. & W. 517.
(4) 3 Sim. 312.
(5) 3 Giff. 226.

bably this was a slip. But the instrument in question is a deed, and it must be construed according to its tenor, and I cannot find anything within the four corners of the instrument from which I can gather that the settlement was intended to give her the income during that period. Moreover, the deed does expressly limit certain furniture to her, not merely during the joint lives, but during her life; and I do not feel myself at liberty to depart from, or add to, the language of the deed merely from conjecture. Consequently, the income from the death of the husband until the wife's death is not settled on her by the deed; but it results to her, independently of the deed, by reason of her having been the owner of the property settled. In *Tunstall* v. *Trappes* (1), which was cited by Mr. Swinfen Eady, the trusts were, to pay the income to Mrs. Tunstall for her separate use during her coverture; and if she should die before her husband then to him for life, and after the death of the survivor the capital was given to the issue of the marriage. If the words "for her separate use during coverture" had been omitted, she would clearly have taken a life interest; and their insertion was held not to cut down the life interest, but merely to amount to a parenthetical indication how that interest was to be enjoyed during the coverture. I can find no similar or analogous words in the present case; the frame of the trusts is quite different. [After stating the facts, his Lordship continued:—]

It is obvious that the plaintiffs are not all in the same position, and I will first consider the case of the infants as against the defendant Hugh Browne. They are interested as reversioners in having the capital of the trust funds made good; but they have no interest in the income, and no Statute of Limitations can be set up against them. Their case is that the defendant H. Browne obtained possession of part of the trust funds, and deliberately applied them in what he knew was a breach of trust, by reason of which the losses complained of arose; that this would have made him personally liable, even if he had been a trustee; and that the present is an a fortiori case. It is quite clear that when Hugh Browne first intervened matters

(1) 3 Sim. 312.

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were in a most critical position, and it was very difficult to say what was the best course to adopt. Hugh Browne says that he told Harold Reeves and Arthur Reeves on January 11, 1884, that he had for years advised clients against this Court, and that, if recourse was had thereto, the little chance there was of getting the money from James would be destroyed. I have already said why I think that Hugh Browne was mistaken in saying that Arthur Reeves was present on that occasion. While dissenting altogether from that general advice, I do not condemn the course adopted in the particular case. If the Court had been asked to appoint a receiver, this could hardly have been done ex parte; and, if affidavits had been filed and notice of motion given to James and Walker, the result would probably have been to precipitate the catastrophe which it was so desirable to avoid. In any case, Hugh Browne would hardly have been appointed receiver himself; and it is doubtful whether any one could have been found who would have shewn so much tact and have managed the matter with so much success as he did. It would have been more regular if he had procured the funds to be placed in the joint names of James and Walker, the two then existing trustees; but Walker was not acting, and probably would have been difficult to move, and he might have wanted to employ his own solicitor; and, prompt and energetic action being essentially necessary, I cannot say that Hugh Browne was wrong in getting the funds into the joint names of James and another person who was reliable—at least, if it was wrong, I cannot blame him under the circumstances. But there, in my opinion, the line must be drawn. The recovery of the fund is one thing; the application of it when recovered is another. When the funds stood in the joint names in the bank they were safe. James could no longer misapply them; and there they ought to have remained until new trustees had been appointed, who could exercise the powers of investment contained in the settlement. Instead of adopting that course, the husband and Hugh Browne, and in a minor degree Arthur Reeves, took upon themselves without any necessity to lay out the trust funds upon mortgages of a most improper description. Hugh Browne told me openly more than once that he had no confidence in the Court of

Chancery, and that no solicitor could carry on business in accordance with its rules; and assuredly he did not attempt to do so. It is idle to tell me, as he now does, that the course adopted was rendered necessary in order to get money from James. In none of the cases which are the subject of this action was money for a mortgage obtained from James direct: it was always taken from the joint account at the bank, where it was perfectly safe; and the same course precisely was adopted, even after James had made good all that was due from him. Moreover, if pressure on James was the object, why should he be pressed with unauthorized securities, instead of authorized ones? I do believe that it was considered desirable to press James for money on the ground that it was wanted for investment; but I do not believe that these mortgages were selected because they were better for that purpose than legitimate securities would have been. I have no doubt that they were chosen because Harold Reeves desired to have a high rate of interest, although at some risk as to the capital—a reason sufficient in itself to stamp the investments as improper, even if made by duly constituted trustees: see *Raby* v. *Ridehalgh*. (1) Hugh Browne told me that he might have been able to procure mortgages on trade securities, or on land, but that he carefully did not do so. He declined them because of the general danger as to trade premises; and as to land, because of Irish troubles, and the great depression of land in England; and he preferred builders' securities, even on unfinished houses. An investment on authorized securities does not seem to have entered his mind at all. He admits also, as his letters shew, that he feared builders' securities would soon depreciate; and, therefore, he never advanced as much as the builders asked for. But he says that he always kept money back till due progress was made in the work. It is not merely the last advances which are bad; the very first advances were equally so, for they were on unfinished property, not producing one penny of income, and they were made to persons of no means, independently of the fact that they were to a great extent applied in repaying Hugh Browne's own advances. The securities were speculative and risky, and not only unauthorized,

(1) 7 D. M. & G. 104.

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but highly improper for trustees to make, whatever their powers might be; and nothing could illustrate this better than Hugh Browne's own statement that he was compelled to go on advancing to Osborne, or he would have stopped building: see *Smethurst* v. *Hastings* (1); *Learoyd* v. *Whiteley* (2); *Blyth* v. *Fladgate*. (3) It is not without importance that Hugh Browne was acting throughout as solicitor for the mortgagors as well as for the nominal mortgagees. The moneys laid out by him while there were no trustees were advanced on his own responsibility, he being a principal in the matter, and not a mere agent for persons under whose lawful directions he was acting—for his letters shew that he was awake to the fact that Arthur Reeves and Miss Reeves were not appointed trustees, and that neither they nor Harold Reeves had power to give him directions in the matter. This renders such cases as *Barnes* v. *Addy* (4) wholly inapplicable to the present. It was said, indeed, that James was a trustee, and that this conferred authority upon Hugh Browne as his agent. It might as well have been added that James Walker was a trustee also. As a fact they were still trustees; but James Walker was entirely ignored, and never from beginning to end communicated with at all as to the investments; and James was treated as a hostile party, and never informed of the nature of the proposed securities, or ever consulted about them; and it is hopeless for Hugh Browne to attempt to shelter himself under the plea of agency for trustees. An agent merely acting as such for an authorized principal is not accountable; but, if he gets possession of trust funds, and misapplies, or assists in misapplying, them, he is no longer a mere agent, but a principal, and liable as such: see *Morgan* v. *Stephens*. (5)

With respect to such transactions, however, as took place after the new trustees were appointed, the case stands somewhat differently. The statement of claim alleges that, in addition to sums amounting together to 4000*l.* advanced to Osborne on the mortgages (1, 3, and 8), as already mentioned, moneys coming from other securities subject to the trusts of the settlement were

(1) 30 Ch. D. 490.
(2) 33 Ch. D. 347; 12 App. Cas. 727.
(3) [1891] 1 Ch. 337.
(4) L. R. 9 Ch. 244.
(5) 3 Giff. 226.

received by the defendants, 800*l.* of which was invested in the names of the new trustees on a mortgage dated in September, 1884; and that certain other parts of the trust funds were also advanced by the defendants in completing the houses on Osborne's properties; and seeks to make the defendants liable therefor. Very little information was laid before me with respect to these matters, and the alleged mortgage of September, 1884, was not produced or proved. I know nothing of the circumstances under which it was made, and I cannot grant any relief in respect of it. As regards the other advances, no details thereof were given in evidence; they were all made when the trusteeship was full, and there were principals whose agent the defendant Hugh Browne might be; and I am not prepared to hold that these subsequent advances necessarily stand on the same footing as those which were made before the new trustees were appointed; or that there are other independent grounds established upon which he can now be charged therewith, or any present relief given.

The next question I come to is whether Arthur Browne is liable as well as Hugh Browne. They were partners as solicitors during the whole period in which the transactions in question were in progress, and till after the commencement of this action, though they have now ceased to be so. The defence alleges that Hugh Browne usually and principally attended to the matters referred to in the statement of claim, and that Arthur Browne had no personal knowledge as to the greater part of those matters. This probably is a pretty accurate version of the facts. In the usual course of a partnership business there is a division of labour; some parts of the business are transacted by one partner, some by another, and ordinarily the one partner does not interfere in the business of the other, unless in the absence of the latter, or the unusual importance of the business, or the like. Whatever one partner does in the ordinary course of the partnership business, and within the scope of his authority, he does as agent for the other, and each partner is liable for such acts of his authorized agent, whether it be the receipt of money or anything else; and it is immaterial whether the other partner is or is not aware at the time of what is done, or does or

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does not himself actually get the possession or control of the money. If money thus received by a firm, or by one of its partners as its authorized agent, is misapplied, the firm is liable for that money. If, on the other hand, the receipt of money by one partner is not within the scope of his authority, then his receipt cannot be treated as the receipt of the firm, or the other members thereof; and the other partners are not liable, unless the money received comes into their possession or under their control. The authorities for these propositions will be found collected in the well-known work on Partnership by Lord Justice Lindley, and I may refer specially to *St. Aubyn* v. *Smart* (1), in which the business generally was conducted, and the money received, by one member of the firm, and paid to his own account, as in the present case; and yet both partners were held liable. I would mention also the recent cases, *Blyth* v. *Fladgate* (2), where the trust moneys misapplied had gone to the account of the firm; and *Rhodes* v. *Moules* (3), where the moneys had been in the possession of one partner alone, but the receipt thereof was within the scope of his authority. See also s. 11 of the Partnership Act, 1890 (53 & 54 Vict. c. 39), which is merely declaratory of the previously existing law. When it is borne in mind that the receipt of money by a partner in the ordinary course of business is a receipt by the firm, it will be seen that the present case falls within both branches of that section. See *Rhodes* v. *Moules*. (3) Looking at the evidence in the present case, the proof that what was done by Hugh Browne was done on behalf of the firm in the ordinary course of its business is overwhelming. I have referred already to many instances in which important letters were addressed to or signed by the firm, and many others are in evidence. All the written communications between the solicitors and the surveyors consulted are addressed by or to the firm; moneys belonging to the Reeves trust to the amount of upwards of 10,000*l.* were either sent to or acknowledged by the firm, though the five cheques which alone are in evidence were drawn in favour of H. Browne only. On February 21, 1884, the cheque

(1) L. R. 5 Eq. 183; 3 Ch. 646. (2) [1891] 1 Ch. 337.
(3) [1895] 1 Ch. 236.

for Osborne's second 1600*l.* was sent to the firm. On March 5 the receipt of 4000*l.* for Cordon's second mortgage and Price's three mortgages was acknowledged by the firm. On April 15 a receipt by the firm for 1050*l.* for Evans and Woodcock's and Carver's mortgages was added at the foot of a letter from Hugh Browne signed by him. On April 18 two cheques for 800*l.* for Osborne's mortgage (8) were sent to the firm, and on the next day the receipt of the firm for the money was sent at the foot of a letter signed by Hugh Browne; and on June 24 the defendant Arthur Browne himself wrote and sent a telegram, and a letter, in the name of the firm, acknowledging the receipt by the firm of the 3000*l.* for the Williams mortgage. Further, on March 24 a letter was sent in the firm's name asking that a cheque for 650*l.* might be sent payable to the firm, though that remittance was not then made. In addition to this, the books of the firm contain very important entries on this subject. They include an account headed "H. J. Osborne in account with M. Browne & Sons," in which the first item is "February, 1884. Received from Mr. A. R. Reeves and Miss Reeves, to lend to you on mortgage of ten houses in Burford Road, Nottingham, 4000*l.*" And then Osborne is debited on the other side with various payments by the firm to or for him thereout, commencing with the purchase-moneys for the lands included in securities (1, 3, and 8), the advances to Osborne, the costs of M. Browne & Sons for those mortgages (amounting together to 106*l.*), the further advances to builders on account of work done on the property, and ultimately, on November 1, 1884, a further charge of 21*l.* 0*s.* 1*d.* was made for the firm's costs for the past six months. There were also similar accounts opened in the firm's books, headed "M. Browne & Sons, in account with Cordon," in which the firm debit themselves, and credit Cordon, in January, 1884, with the two sums of 1200*l.* and 1500*l.* as "Amounts agreed to be lent to you on mortgage by Mr. A. R. Reeves and Miss M. Reeves," and charge Cordon on the other side with the advances to him, and two sums of 35*l.* each as M. Browne & Sons' costs for the mortgages, shewing balances due from the firm to Cordon. With respect to Price's securities no similar account was put in evidence; but the cash-book of the firm does contain an entry that on March 10, 1884, the firm

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received 2500*l.* to lend to Price on mortgage, the sum being credited on that day as the proceeds of a cheque received on March 5. It also shews various payments per contra, including 36*l.* 13*s.* 4*d.* to M. Browne & Sons for their costs. There were also accounts opened in the books, "M. Browne & Sons with the trustees of Mr. and Mrs. Reeves," commencing in May, 1884, in which the firm charge themselves with the capital sums received from this trust to be lent to Bottomore, Williams, Evans and Woodcock, and Carver, and take credit for the subsequent loans of these sums to the mortgagors; and the accounts also shew the receipt by the firm of the interest on these and on Price's mortgages, and the application thereof from time to time, including many payments to Mrs. Reeves for interest, shewing also the balances from time to time in the hands of the firm. It was the firm who charged, and who received, payment of all the costs in connection with these matters; and, lastly, the payment of 100*l.* by Harold and Arthur Reeves, as before mentioned, for the costs incurred in connection with the discharge of the old and appointment of the new trustees, was on May 21 acknowledged in the name of the firm, and it is proved that it went to their credit. It is admitted by Arthur Browne that the firm did a good deal of business in advancing the money of clients on builders' securities, but that Hugh Browne principally did that kind of business, and though Arthur Browne knew it was going on he had little to do with it; and he says that he had nothing to do with any of the matters now complained of, except ministerially in his brother's absence; and that, though he knew it was going on in the office, he did not know the details. He also adds that a great deal of his time was given to the performance of his duties as deputy coroner; that the books were kept by Hugh Browne, and that he did not recollect that he had ever previously seen the entries proved in this action, though of course they were always open to his inspection. This latter incident existed in *Blair* v. *Bromley* (1), but was held insufficient to excuse the other partner. These circumstances prove conclusively, in my opinion, that all these matters were done by or on behalf of the firm, and that the defendants are

(1) 5 Hare, 542; 2 Ph. 354.

jointly liable for the misapplication of the trust funds, just as they jointly had the benefit of the profits.

The next question arises as to the position of Mrs. Mara, the tenant for life, and it is said that, even if the defendants are liable in respect of the capital to the infants, they are under no liability to her in respect of the income; for, first, the Statutes of Limitation are an answer to her claim; secondly, she consented at the time to all that was done and confirmed it afterwards; and, thirdly, if the defendants are under any liability in this action to any one, the whole income of Mrs. Mara under the settlement ought primarily to be impounded to provide for that liability, by way of indemnity to the defendants, under s. 6 of the Trustee Act, 1888. I will deal first with the second and third points.

The facts are as follows. Mrs. Mara was during the whole of the period in question a married woman restrained from anticipation. She was called as a witness before me and gave her evidence very fairly, with apparently no hostile bias against the defendants; and, though she shewed no signs of being a clever woman of business, she seemed fairly intelligent. Her evidence was to the effect that she lived with her husband at Torquay, and had entire confidence in, and left all business matters to, him; that she never remembered any occasion on which she was personally consulted at all as to investments; that her husband used to tell her what was going on about the trust, and read to her the letters to him on the subject and his replies, and if he thought all was right she did too; that she also used to be informed of what passed between her husband and Arthur Reeves; that she recollected the trouble with James, and that her husband wished they should continue to receive 5 per cent. interest; that she never had the least ground for believing that the securities they were taking were unsafe or risky, and could not remember any conversation with any one to that effect, and she certainly never had any separate legal advice. With respect to what Arthur Reeves knew himself, and might have communicated to Mrs. Mara, he says that he never heard it said in his presence that Harold Reeves or his wife insisted on having 5 per cent. interest, and that he relied on Hugh Browne

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as to all that was done. Hugh Browne himself stated in cross-examination that he did not think he gave any special advice to Arthur Reeves as to investments as a trustee; that he could not have done so, as he was so anxious to get money from James; that he gave no such advice to Miss Reeves; that he cannot say that he ever told Mrs. Mara that builders' securities were improper for trustees, and cannot recollect ever using any stronger phrase than that such securities were "hardly fit for trustees," and that was to Arthur Reeves. With respect to Arthur Reeves, Hugh Browne told me, speaking to the best of his recollection, that the first time he saw Arthur Reeves was about December 18, and the next was January 3 or 4, at which time no question as to builders' securities had come up; that the next was January 11, and the next about April 18. I have already mentioned my doubts as to any interview on January 11. With respect to Mrs. Mara, she was living in Devonshire, and Hugh Browne went down there for a few days at the end of March, before which time there had been no personal interview between them since these difficulties began. And it is not suggested that any written communications passed between him and her. It must not be forgotten that the settlement required Mrs. Mara's consent in writing to all new investments. The defendants plead that all the securities were taken at the instigation and under the direction of Harold Reeves, Arthur Reeves, Miss Reeves, and Mrs. Mara, upon the reports and advice of competent surveyors, which Arthur Reeves and Miss Reeves saw, accepted, and approved, and not upon the advice of either of the defendants, and that Mrs. Mara gave her consent in writing to all of them. This version of the transactions is almost entirely fabulous. As to Mrs. Mara's alleged consents, one only was given—namely, to the two first mortgages to Osborne and Cordon. The document has been lost, but it is mentioned in the correspondence, and Hugh Browne has produced a rough draft of it. But it is clear that no such consent was given on any later occasion. Hugh Browne says that, as Arthur Reeves received that consent from Mrs. Mara, he took it for granted that he would receive like consents on subsequent occasions; while Arthur Reeves says that, as Hugh Browne himself suggested and

proposed the first consent, he supposed that he would procure any others that were necessary. Between them no consent in writing was subsequently given or asked for, and this seems to me a strong indication that Mrs. Mara's concurrence generally was thought unnecessary. The rough draft produced is dated February 13, and is addressed to Arthur Reeves and Marian Reeves, and requests and consents to their lending 1200*l.* to Cordon on sixteen leasehold houses, and 1600*l.* to Osborne on four freehold houses, out of moneys belonging to Mrs. Mara under her marriage settlement, of which she intended to appoint them trustees. It bears no signature, but the original was signed. Investments on freeholds and leaseholds were authorized by the settlement; but the consent does not indicate that the houses were unfinished and unlet, nor that the securities were in any way objectionable, much less that they were breaches of trust. Then, as to the so-called valuations—such of them as were (for they were not all) produced to Arthur Reeves, were only sent to him after the mortgages to which they related had been completed, and none of them were ever seen, much less approved or accepted, by Miss Reeves or Mrs. Mara.

Then it is said that Mrs. Mara's execution of the deed of appointment of new trustees was an adoption of, and consent in writing to, all the investments in question. But a consent to investments under the settlement ought, in order that it may be effectual, to be given before the investments are completed, and the deed of appointment was later than the last of the mortgages and could not operate retrospectively. The deed, moreover, merely refers to a list of securities in the schedule as those upon which the trust funds were invested, and there is nothing explaining the nature or character of the investments, or indicating that any of them was unsafe or improper in any way. Of subsequent acquiescence or laches on the part of Mrs. Mara I do not find any proof, inasmuch as there is nothing to shew that she afterwards acquired any more information upon the subject than she had at the time when the investments were made, until shortly before the action was brought. And it is hardly open to the defendants to argue that Mrs. Mara had at any subsequent time full information about, or acquiesced in, any breach of trust,

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when they do not suggest how such information was obtained; when nothing of the sort was suggested to her in cross-examination; and when, moreover, they persistently deny from first to last that there was any breach of trust in the making of these investments. In addition to this, I do not find that the position of the defendants has been prejudicially affected by the lapse of time which has occurred. Under these circumstances, if Mrs. Mara had a right of action when her husband died, I can find nothing to deprive her of it, unless the statutes relied upon in the defence have that effect. [His Lordship referred to s. 6 of the Trustee Act, 1888, and s. 45 of the Trustee Act, 1893, and continued:—]

Pausing there for a moment, it had then long been the law that a cestui que trust, at whose instance or request a breach of trust had been committed, could be required to indemnify the trustees to the extent to which the cestui que trust had received a benefit from the breach of trust, upon the ground that the liability ought primarily to fall upon the person who procured the breach of trust, and who, having got the benefit of it, ought not to be allowed to victimise the trustees by treating them as scapegoats. But it was decided in *Sawyer* v. *Sawyer* (1) that this principle could only be applied to a married woman, if she had really acted for herself in the matter, and was fully informed as to the state of the case. According to Chitty J.'s view in that case (see p. 598) that Act went rather beyond the old law, by the introduction of the words "consent in writing"; but I have already pointed out that there was no such consent in the present case, except as to the first two mortgages to Osborne and Cordon. It was held in *Griffith* v. *Hughes* (2) that there might be an instigation or request, which would bring the statute into play, although not in writing; and this view was confirmed by the decision of the Court of Appeal in *In re Somerset.* (3) I think that the Act and the cases, including *Bolton* v. *Curre* (4), before Romer J., shew that a mere consent in writing is a different thing from, and does not necessarily amount to, an instigation or request; but I do not find that there was any instigation

(1) 28 Ch. D. 595.
(2) [1892] 3 Ch. 105.
(3) [1894] 1 Ch. 231.
(4) [1895] 1 Ch. 544.

or request by Mrs. Mara beyond, or independently of, the consent which she gave. Moreover, as is pointed out by Lord Justice Lindley in *In re Somerset* (1), consent to investment is one thing, consent to breach of trust is another, and the section is not to be construed as if the word "investment" had been used instead of "breach of trust"; and, in order to bring a case within the section, the cestui que trust must instigate, or request, or consent in writing to some act or omission which is itself a breach of trust, and not one which merely becomes so by reason of want of care on the part of the trustee; or, I will add, by anything else outside the request or consent. Lord Justice A. L. Smith in the same case expressed his view (p. 270) that a trustee seeking relief under the section must establish that the beneficiary knew the facts which rendered what he was instigating, requesting, or consenting to in writing, a breach of trust. And he held that, though the cestui que trust in that case was much desiring and pressing for the investment, he left it to the trustees to determine if it were a proper one for the moneys proposed to be advanced, and thought he was getting a good and secure investment. Lord Justice Davey's view (at p. 274) is concise and clear. He says: "Undoubtedly the investment was made at the instigation or request, or with the consent in writing, of Mr. Vere Somerset. But I am of opinion that is not enough; and that in order to bring the case within the section the beneficiary must have requested the trustee to depart from and go outside the terms of his trust. It is not, of course, necessary that the beneficiary should know the investment to be in law a breach of trust; but he must, I think, know the facts which constitute the breach of trust." There might be some question, according to this case, whether even Harold Reeves himself could have been brought within the section; but this it is unnecessary to consider, as he is dead, and consequently no income of his can be impounded. Assuming that the section could have been applied to him, I am of opinion that Mrs. Mara is not within it, and that no part of her income can be impounded. To this I must add that, even if the section did apply, it only directs that the Court may, if it shall think fit, make such order for

(1) [1894] 1 Ch. 265.

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impounding "as to the Court shall seem just." And, considering as I do, that, under the circumstances of the present case, Mrs. Mara's position is more like that of the lamb than of the wolf in the fable, I should regard an order that her income should be impounded to indemnify Hugh Browne as the height of injustice.

Before leaving the 6th and passing to the 8th section of the Trustee Act, 1888, I must refer to a suggestion not irrelevant to both these sections—namely, that the defendants are not trustees at all and so the Act does not apply to them. The suggestion as to Hugh Browne is that he is not a trustee, but a trustee de son tort; and, like an executor de son tort, subject to the liabilities, but not entitled to the rights, of a real trustee. But it is provided by s. 1, the interpretation clause, that the expression "trustee" includes a trustee whose trust arises by construction or implication of law as well as an express trustee. According to *Soar* v. *Ashwell* (1), Hugh Browne received part, at any rate, of the money in question on an express trust; and, even if he did not, I think that it is not open to the plaintiffs, whose only ground of action against him is breach of trust, to say that the person sued is not a trustee. I entirely concur in the remarks of Lord Justice Lindley on this point in *In re Lands Allotment Co.* (2)

With respect to Arthur Browne, it is hardly worth while to consider whether he is constructively a trustee or not; for, assuming him not to be a trustee, even to the extent of the money actually received by the firm, still he is by the law of partnership liable exactly to the same extent that his partner Hugh Browne is, and they must stand or fall together. See the observations of Stirling J. in *Moore* v. *Knight* (3), and the judgments of the Court of Appeal in *Thorne* v. *Heard.* (4)

Now, with reference to the defence of the Statutes of Limitations, the important dates are these—the writ in this action was issued on November 7, 1890, the last of the eight advances in question having been made by Hugh Browne in April, 1884, a little more than six years previously; and Harold Reeves

(1) [1893] 2 Q. B. 390.
(2) [1894] 1 Ch. 616, 631, 632.
(3) [1891] 1 Ch. 547, 555.
(4) [1894] 1 Ch. 599.

died on April 17, 1885. [His Lordship read s. 8 of the Trustee Act, 1888.]

The first question is, whether this action is excepted from the operation of that section. It was not argued that the present claim was founded on any fraud or fraudulent breach of trust to which Hugh Browne was party or privy; and I do not think such terms applicable to his conduct, for the advances were not made for any personal benefit to him; and, unlikely as it seems, I believe he really did expect that they would ultimately be got back somehow. But the exception also includes actions to recover trust property which has been received by a trustee and converted to his use, even though there has been no fraud or fraudulent breach of trust; and this applies precisely to the present action, so far as regards the sums retained by Hugh Browne out of the proceeds of cheques to recoup himself the amounts previously advanced by him to the mortgagors. Except to that extent, the action does seem to me to come within s. 8.

Turning back, then, to that section, I omit sub-s. 1 (*a*) as not affecting the present case, for the reason given by Fry L.J. in *In re Bowden.* (1) Then, as regards sub-s. 1 (*b*), this action is one against a trustee to recover money, to which no "existing" Statute of Limitations applies. If the action were one of debt for money had and received, there having been no payment or acknowledgment in the meantime (for the receipt of interest or rents is not an acknowledgment: see *In re Somerset* (2)), sufficient lapse of time would furnish a complete defence; and by this section time is to run even against a married woman restrained from anticipation, if she is entitled in possession. But then the final proviso is, that the statute is not to begin to run against any beneficiary "unless and until the interest of such beneficiary shall be an interest in possession." And under that proviso a very nice and difficult question arises, as it involves my deciding what the legislature meant by inapt words in a case which most probably was not in their contemplation at all. The breaches of trust in question were all committed before the end of April, 1884. Harold Reeves died in April, 1885, long before six years had run from those breaches, and

(1) 45 Ch. D. 444, 451. (2) [1894] 1 Ch. 231.

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upon his death the interest limited by the settlement to his wife for their joint lives, for her separate use without power of anticipation, expired. Thenceforward she was entitled to a new estate for her own life; and six years from that date had not elapsed when this action was commenced. If the first limitation of the income in the settlement had been to the wife for her life, I think the statute would have run. But she took two different interests in the income, for different periods, under different titles—one in possession for the joint lives of herself and husband, and the other in remainder after his death for the rest of her own life. These two separate interests could not in any way coalesce, nor could one merge in the other, as the second only commenced when the first was ended; the first could never have been disposed of during the coverture, though it was in possession, because it was subject to a restraint on anticipation; the second, though reversionary, could have been disposed of during the coverture under Malins' Act, as it was not settled by the marriage settlement. Sect. 20 of 3 & 4 Wm. 4, c. 27, contains elaborate provision as to future interests being barred in the case of owners of preceding estates which have been barred; under which, if that Act applied to limitations of personal estate, and this case came within its provisions (which, as it seems to me, it does not), Mrs. Mara's interest in the capital of the trust funds would or might have been barred also. But I will not pursue that topic further. There is no corresponding provision in the Act of 1888; and the final words of s. 8, sub-s. 1 (*b*), that the statute is not to begin to run against any beneficiary "unless and until the interest of such beneficiary shall be an interest in possession," seem to me to shew that the only interests to which the statute applies are interests in possession. I think it impossible to hold that under this section, even if Mrs. Mara's life interest in the income of funds recovered were barred, her right to the capital of the funds, in the event of her children both dying without attaining vested interests, could be barred also; for this would be making the statute apply to the interest of a beneficiary which is neither vested nor in possession, but contingent and reversionary only. And, if the statute cannot affect Mrs. Mara's reversionary interest

in the capital, I do not see how it can affect her second reversionary life interest in the income before that interest fell into possession on the death of Harold Reeves, within six years from which time the writ was issued. Under these circumstances I come to the conclusion that the statute furnishes no defence against Mrs. Mara. If the first trust in the settlement had been to pay the income to Mrs. Mara for her life, my conclusion on this point would have been different; and I should in that case have held that she was entitled to receive the income of so much of the capital recovered as represented the moneys converted by Hugh Browne to his own use by recouping his own advances, as such moneys are excepted from the operation of s. 8 of the statute of 1888; and the defendants would be entitled during Mrs. Mara's life to receive the income of the rest of the capital recovered.

The remaining question is, as to the right of the plaintiff trustees against the defendants, and it may be dealt with very briefly. One of the most extraordinary things in this case is the position occupied by Miss Marian Reeves. How she ever agreed to become a trustee is in no way explained. She was not before me as a witness. The plaintiffs' counsel did not call her, though they offered to do so if the defendants desired it. The defendants were indifferent upon the subject; and thus I did not see her. From beginning to end she seems to have been treated as a nonentity, who merely lent her name as a trustee. Not a single letter between her and any other person is in evidence. The few allusions which there are to her in letters between other persons shew how completely she was ignored. It was not suggested in the evidence, nor does it appear from the letters, that she had ever seen Hugh Browne; but I observe that he did attest her execution of the deed appointing her a new trustee. She resided at Birkenhead with her brother Arthur Reeves. There are only two passages in his cross-examination which throw light on the position which she occupied. In one he says: "I knew that securities were being taken in my name in anticipation of my being appointed as a trustee. I never discussed this with Marian Reeves, and I do not think I mentioned it to her." And again he says: "I told my sister what was going on, and I believe I

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communicated to her from time to time what I knew myself." I have no means whatever of fathoming the depth of her knowledge or of her ignorance, and fortunately I do not think it is very material. Her folly in allowing herself to accept a trusteeship under such circumstances, and the folly and worse than folly of those who permitted and encouraged her to do so, is almost beyond belief. The defendants clearly undertook to act as solicitors for her and her brother Arthur, and they failed egregiously in their duty by neglecting to give any of the parties proper, or, indeed, any, information or advice as to the rules of the Court for the guidance of persons who are lending trust moneys on mortgage; and Hugh Browne treats himself as being superior to any such rules, and says that he could not carry on business in accordance with them. If Miss Reeves and Arthur Reeves had in due time brought an action for negligence against the defendants, their success would have been certain. But this is not an action for negligence; if it had been, Mrs. Mara and her children would not have been proper parties to it, and the Statute of Limitations would have been a complete answer to the other plaintiffs. This is an action to have the trust funds which were misapplied made good, and I do not think that such an action can now be brought by the persons who shortly after the completion of the impugned transactions were appointed trustees, and have never since repudiated or disclaimed them. I agree with the conclusion arrived at by Stirling J. on a very similar point in *Blyth* v. *Fladgate* (1) and in *Morgan* v. *Blyth*. (2) But this is not of practical importance. The other plaintiffs, Mrs. Mara and her children, are entitled to all the relief asked; their case has not been strengthened in the slightest degree by the joinder of the trustees as co-plaintiffs; the latter must have been made parties to the action, either as plaintiffs or defendants, and it seems to me immaterial for all practical purposes which they are. If any of the parties desires it the trustees may be struck out as plaintiffs, and added as defendants. They are not seeking independent relief, and no claim has been made against either of them.

I must, therefore, declare that the defendants are jointly and

(1) [1891] 1 Ch. 351. (2) [1891] 1 Ch. 363.

severally liable to make good to the trust estate the loss occasioned by the investment of the trust funds upon the eight securities in question. And there must be a direction for a realization of the securities still remaining unsold, and proper inquiries must be directed to ascertain the amount of the loss.

With respect to costs, the case is a somewhat hard one upon the defendant Arthur Browne; but I do not see how I can draw any distinction between him and his partner. The defendants must pay the costs of the action, down to and including the trial, except so far as they have been increased by the joinder of Arthur Reeves and Marian Reeves as co-plaintiffs, and of Michael Browne, deceased, as defendant. Further consideration and subsequent costs must be reserved, with liberty to all parties interested to apply.

Mr. Cozens-Hardy asked me to give interest as prayed at 4 per cent. The plaintiffs are entitled to that, if they wish it; but, as against that interest, the rents and interest paid to Mrs. Mara must be set off, and an account of them must be taken for that purpose.

Solicitors: *Steadman, Van Praagh, Sims & Co.; Swann & Co.*

W. L. C.

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April 3, 4.

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[1893 E. 396.]

Statute of Limitations—Real Property Limitation Act, 1874 (37 & 38 *Vict. c.* 57), *s.* 8—*Money charged upon Land—Presumption of Payment of Interest by Devisee in Fee, being also Tenant for Life of the Money—Effect of such Payment as regards Testator's Personal Estate.*

A testator, having covenanted for the payment of a sum of money after his death, to be held upon trusts under which his son was tenant for life, and charged the same with interest upon certain land, by his will devised the land, subject to the charge, to his son in fee. The money was never raised, nor any interest actually paid in respect of it, but the son entered into possession of the land, and for more than twelve years received the rents and profits:—

Held, that no presumption of payment of interest by the son, on the ground of any duty on his part to keep down the interest, could be made, and that, even if such payment could be presumed, it would not operate so as to prevent the Statute of Limitations from running in favour of the testator's personal estate.

ADJOURNED SUMMONS.

William England, by an indenture of covenant dated September 20, 1870, in contemplation of the marriage of his son, William George England, covenanted with the trustees named in the deed for the payment to them, on or before the expiration of twelve calendar months after the death of the covenantor, of the sum of 4000*l.* with interest from the death at 4 per cent., and declared that certain specified hereditaments, known as the Hindringham estate, should be and remain charged with the 4000*l.* and interest.

By an indenture of even date, being the settlement made on the marriage of William George England, it was declared that the trustees should stand possessed of the said sum of 4000*l.* and interest upon trust for investment and to pay the income to William England during his life, and after his decease, to William George England during his life, and after the decease of the survivor upon the usual trusts in favour of the wife of

William George England during her life, and after her death of the issue of the marriage.

William England, by his will dated November 1, 1870, appointed William George England, and James Edward Fraser and William Peckover executors and trustees thereof, and gave and devised the Hindringham estate to William George England, his heirs and assigns, subject nevertheless to the 4000*l.* and interest charged thereon in favour of the trustees of the settlement, and secured by the indenture of covenant. After devising to his trustees certain other specified real estate upon trust to raise thereout the sum of 1500*l.* to be deemed part of his residuary estate, and subject thereto upon certain trusts in favour of another son of the testator, and the wife and children of such son, the testator gave and devised to his trustees all the residue of his real and personal estate upon trust for sale and conversion as therein mentioned, and directed that the trustees or trustee should out of the moneys arising therefrom pay the testator's just debts and funeral and testamentary expenses and a legacy of 200*l.* to his wife, and should stand possessed of the ultimate residue of the said moneys upon certain trusts in favour of the testator's three daughters and their husbands or children, if any.

The testator died on June 1, 1871; and on September 2, 1871, his will was duly proved by William George England and James Edward Fraser alone, William Peckover having renounced probate, and by deed disclaimed the trusts of the will.

Immediately after the testator's death William George England went into possession of the Hindringham estate under the devise in his favour, and had ever since remained in possession or in receipt of the rents and profits thereof.

The Hindringham estate had ever since the death of the testator been under the sole control and management of William George England, and James Edward Fraser had never at any time in any way dealt with such estate or any part thereof.

The 4000*l.* had never been raised, and no payment of interest thereon had been made, unless such payment could be presumed from the receipt of rents and profits by William George England as above mentioned.

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The Hindringham estate was formerly believed to be of the value of 8000*l.*, but, owing to depreciation in the value of land, it was now considered doubtful whether it was worth the 4000*l.* charged upon it, and accordingly the question arose whether the residuary personal estate of William England could be resorted to for payment.

This summons was then taken out, in the matter of the settlement of 1870 and of the estate of William England, by Charles Richard Steward, the sole surviving trustee of the indentures of September 20, 1870, on behalf of himself and all other creditors, if any, of William England, as plaintiff, against William George England, his wife and children, and James Edward Fraser and the testator's three daughters, asking (inter alia) that it might be determined whether the 4000*l.* ought to be realized, and whether the residuary personal estate of the testator William England was liable to any extent to make good the 4000*l.* to the plaintiff.

On the hearing of the summons the question was argued whether there had in law been any such payment of interest by William George England as would operate to prevent s. 8 of the Real Property Limitation Act, 1874 (1), from running so as to bar the right of action for the 4000*l.* under the covenant contained in the deed of 1870 as against the residuary personal estate of the testator. It was not disputed that as against the Hindringham estate itself the charge was still subsisting.

L. S. Bristowe, for the plaintiff. The question is whether the covenant by the testator William England is still enforceable as

(1) The Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 8, is as follows: "No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit or proceeding shall be brought but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given."

against his assets, although no interest has been actually paid on the 4000*l.* charge for upwards of twelve years. I submit that it is. The rule settled by the authorities in such cases is that where the person entitled to a debt secured by a covenant and charge is also the person entitled to the property charged, the receipt by him of the rents and profits is to be treated as payment to himself of the interest on the debt, so as to keep alive, within s. 8 of the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57)—the section substituted for s. 40 of the old Statute of Limitations, 3 & 4 Wm. 4, c. 27—the right of action on the covenant as against the covenantor's estate: *Burrell* v. *Earl of Egremont* (1); *Topham* v. *Booth* (2); *Dibb* v. *Walker* (3); *Sutton* v. *Sutton*. (4) Payment of interest by a mortgagor under his covenant is sufficient to keep the remedy alive even against a surety: *In re Frisby* (5); *In re Powers*. (6)

Ingpen, for the defendants, William George England, his wife and children, took no part in the argument, but mentioned *Fearnside* v. *Flint*. (7)

Warmington, *Q.C.*, and *Badcock*, for the defendant, James Edward Fraser, as representing the estate of the testator William England, and for the defendants, the testator's three daughters, residuary legatees. Sect. 8 of the Act of 1874 is a defence to the plaintiff's claim. There is no authority going to the extent that where, as here, the person who is tenant for life of a mortgage debt is also tenant in fee simple of the mortgaged estate, and so receives the rents and profits of it, payment by him of interest on the debt is to be presumed from such receipt, so as to keep alive the remedy under the covenant in the mortgage deed. There is no direct authority upon the exact point raised in the present case; but in *Coope* v. *Cresswell* (8), where the question was whether payment or acknowledgment by the owner of the personal estate of the covenantor operated to keep the right of action alive against the real estate of the covenantor—the converse of the case here—it was held, following

(1) 7 Beav. 205.
(2) 35 Ch. D. 607.
(3) [1893] 2 Ch. 429.
(4) 22 Ch. D. 511, 516.
(5) 43 Ch. D. 106.
(6) 30 Ch. D. 291.
(7) 22 Ch. D. 579.
(8) L. R. 2 Eq. 106; 2 Ch. 112.

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Dickenson v. *Teasdale* (1), that such payment did not so operate, and that the right of action was barred by the Statute of Limitations (3 & 4 Wm. 4, c. 42). There is no reason why that principle should not be applied to this case.

The foundation of the cases cited on behalf of the plaintiff is that, where the person who is to receive and to pay is a tenant for life, he is under a duty or obligation to keep down the interest of the charge on the inheritance for the benefit of the remaindermen; and payment of interest is, therefore, presumed from his receipt of income. That is pointed out by Lord Langdale in *Burrell* v. *Earl of Egremont.* (2) But that does not apply here. W. G. England, being entitled to the devised estate absolutely, is under no obligation whatever to persons coming after him.

L. S. Bristowe, in reply. The testator, if living, would clearly have been liable under his covenant, and the rights of parties under that covenant are not altered by his death and his devise of the mortgaged estate.

The devisee, William George England, is the person primarily liable under the will to pay the interest on the money charged on the land devised to him, and the duty thus imposed upon him towards those entitled to the personal estate to keep down the interest is as strong as the duty of a tenant for life towards remaindermen can possibly be. Payment of the interest by him must therefore be presumed, and the case must be treated as if the interest had been actually paid. The assignee of an equity of redemption who covenants to pay is sufficiently the agent of the mortgagor for the purpose of paying interest, and so keeping the right of action on the covenant alive: *Forsyth* v. *Bristowe.* (3) The executors of the mortgagor must for this purpose be in the same position as the mortgagor himself; and payment of interest by the devisee of the equity of redemption will, therefore, keep the right of action alive against them. *Coope* v. *Cresswell* (4) is distinguishable in principle from the present case. There the claim was by a bond creditor against the real estate. Such a creditor, in order to get at the real estate, must

(1) 1 D. J. & S. 52.
(2) 7 Beav. 205, 237.
(3) 8 Ex. 716.
(4) L. R. 2 Eq. 106; 2 Ch. 112.

take active proceedings, and unless he does so the devisee is entitled to possession and enjoyment; but in the case of personalty, it is a breach of trust for the executor to administer without providing for debts. *Roddam* v. *Morley* (1), which has never been overruled, and which was followed in *Pears* v. *Laing* (2), is an authority that payment by any person liable to pay preserves the right of action in its integrity; and in *Dibb* v. *Walker* (3) Chitty J. speaks of payment as "setting free the action generally." *Dickenson* v. *Teasdale* (4) proceeded on the ground that there was no obligation on the devisee of a part to pay interest in respect of the whole, and that, therefore, in making such payment he was acting as a stranger to the devisee of the remainder. Here the payment by the devisee was made in the execution of a duty imposed upon him by the testator, and in making such payment he was acting on behalf of the personal estate as fully as the executor himself could have acted. Where, as here, there is a payment by the person liable as between himself and all the other persons interested in the estate, it is submitted that such payment keeps the right of action alive as against every one so interested.

Badcock, in reply on the further cases cited. *Burrell* v. *Earl of Egremont* (5) and other cases shew that the presumption of payment which arises where the hand to pay and to receive is the same applies only to the case of a man who has a duty to perform. A tenant for life owes a duty to the remaindermen to keep down the interest on a charge; but a tenant in fee owes no such duty to any one. There is no ground for inferring an intention on the part of this devisee to keep the right of action on the covenant alive. It did not matter to him whether it was kept alive or not. *Roddam* v. *Morley* (1) merely decided that payment by the tenant for life kept the right of action alive as against the land; there is not a word in that case about any right of action on covenant. The Lord Chancellor there (at page 21) speaks of "those who represent the whole inheritance." *Coope* v. *Cresswell* (6) and *Dickenson* v. *Teasdale* (4) shew that payment may keep the right

(1) 1 De G. & J. 1.
(2) L. R. 12 Eq. 41.
(3) [1893] 2 Ch. 435.
(4) 1 D. J. & S. 52.
(5) 7 Beav. 205.
(6) L. R. 2 Eq. 106; 2 Ch. 112.

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of action alive as to part of an estate without keeping it alive as to the remainder; and so here, payment by the owner in fee may keep the right of action alive against the land without in any way keeping it alive against the personal estate.

KEKEWICH J. The point which I have here to decide, though intimately connected with others which have been decided, and perhaps governed by them in principle, has never really come up for decision standing alone. By a settlement of September 20, 1870, the settlor, William England, the father of the defendant, William George England, covenanted for the payment within twelve months after his death to the trustees of the settlement of a sum of 4000*l.* sterling, and he further covenanted that certain hereditaments specified in the schedule should be charged with that sum. The result was that a specialty debt was thereby created binding on the covenantor, recoverable in due course out of his personal estate, and also, in a due course of administration, out of his real estate, but also charged directly on the real estate there specified. It is common ground that the 4000*l.* remains unpaid, and that no interest has been actually paid for more than twelve years before the commencement of these proceedings; so that if the 8th section of 37 & 38 Vict. c. 57, the Statute of Limitations now in force, touches the case, there is no remedy left to those who are entitled to the 4000*l.* and interest. I say that it is common ground that no actual payment of interest has been made; but it so happens, as has often happened in other cases, that there is a partial identity between the persons entitled to the charge and the persons entitled to the property affected by the charge; and in this case the peculiarity is that the defendant William George England is tenant for life of the charge under the settlement, and is also devisee in fee of the estate charged with the 4000*l.*, and he has been so since 1871. He has not paid the interest; but he has been in receipt of the rents and profits, and in one sense he may be correctly said to have paid the interest to himself. It is not argued that the charge is gone as against the specific real estate, notwithstanding that no payment has been made, and no acknowledgment given. Probably the case falls within the principle of *Burrell* v. *Earl of*

Egremont (1), decided by Lord Langdale, which has been followed in numerous other cases under varying circumstances, such as *Roddam* v. *Morley* (2), *Dibb* v. *Walker* (3), and *Topham* v. *Booth*. (4) But the question arises whether the circumstances existing in this case, which are presumably sufficient to keep the charge alive as against the specific real estate, are also sufficient to keep the right of action alive as against the personal estate; and I gather that the question becomes one of some importance, because this is one of those unfortunate cases in which the real estate charged is not so valuable as it formerly was, and it may be necessary to resort to the personal estate for satisfaction of the covenant. There are numerous cases, including those which I have mentioned, in which payment by the tenant for life of real estate has been held sufficient to keep a charge alive, even as against the personal estate. And the cases go, further, to this—that where the tenant for life is the person to receive and to pay there is no necessity for cross-cheques, for sham payments, entries in books, or the like; but the mere fact that the hand to pay and receive is the same is sufficient. That brings me to the novelty of the position, because here I have no tenant for life, as was the case in other instances, for the person in possession is not tenant for life but tenant in fee. It has been argued in more than one way, and the cases suggest more than one. Mr. Warmington put it principally on the question of duty, and Mr. Badcock, in reply on the further cases cited, has followed that up in the remarks which he has made. What is the duty of a devisee in fee as regards those entitled to the personal estate? A tenant for life has, no doubt, a duty towards the remainderman. Every tenant for life is bound to keep down the interest on the property of which he is tenant for life, and he owes that duty to the tenant in remainder who by proper proceedings can compel him to perform it. But it is asked, What is the duty of a tenant in fee to any one? It is matter entirely for his own consideration whether the charge should be kept alive or not. He may be content that it should be kept alive, or he may be content that it should drop, instead of paying interest to keep it alive.

(1) 7 Beav. 205.
(2) 1 De G. & J. 1.
(3) [1893] 2 Ch. 429.
(4) 35 Ch. D. 607.

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But there is also a question of agency. That view appears in two or three of the cases. In *Dibb* v. *Walker* (1) Chitty J. says this: "Lord Wensleydale . . . . in *Forsyth* v. *Bristowe* (2) . . . . lays it down that payment of interest by the assignee of the equity of redemption (which plainly includes tenant for life of the equity of redemption) is clearly payment of interest, and that the statute 3 & 4 Wm. 4, c. 42, s. 5, did not expressly require that it should be made by the party liable or his agent; and that if it implied it, the assignee of the equity of redemption who covenants to pay is sufficiently an agent for that purpose. In regard to this doctrine of agency, it is to be observed that payment of interest by an agent is not expressly mentioned in the 5th section of the statute under consideration" (that is, 3 & 4 Wm. 4, c. 42); "but it appears to be imported from the other part of the section, which speaks of acknowledgment made by writing by the party liable by virtue of the indenture or specialty, or his agent, and by the general tenor of the section, which treats payment of interest as an acknowledgment." Looking at the case from that point of view, and putting aside the question of duty, it may be that the tenant for life of the charged estate, by reason of the relation existing between him and the remaindermen, is in the position of an agent. But how can the devisee in fee be the agent for the persons who are entitled to the personal estate, and who are liable to pay because that estate is theirs? There really is no connection between them. They both claim, no doubt, through the same testator, but under different devolutions of title, and I fail to see how the devisee in fee can in any sense be said to be the agent of those other parties. That illustrates the advantage of looking at the case from another point of view, though it comes round to the same thing. If the devisee in fee has a duty to do it, it is easy to see that he is agent for the purpose of doing it. If he is agent for the purpose of doing it, it is easy to see that he has a duty to do it. The two things are more or less correlative. But looking at each by itself, it seems to me extremely difficult to say that there is a duty, or that there is a case of agency, and that seems to be a solution of the question which I have to decide.

(1) [1893] 2 Ch. 436. (2) 8 Ex. 716.

In *Coope* v. *Cresswell* (1) a point under the Statute of Limitations was argued and decided which closely bears on that before me now. There the question was, not whether the statute was prevented from operating so as to bar the claim against the personal estate by reason of any payment or acknowledgment by the owner of the real estate, but precisely the converse, namely, whether a payment or acknowledgment by the person entitled to the personal estate kept the right of action alive as against the real estate. The case came in the first instance before Kindersley V.C., and he states the question in this way (2): "The question then resolves itself into this, whether payment of interest within twenty years by those whose duty it was to apply the personal estate, and the proceeds of the sale of the Pinkney estate, in payment of debts, prevents the devisee of the Devon estate from setting up the statute." That is the converse of the point now before me. The Vice-Chancellor had before him both the cases which have been referred to of *Dickenson* v. *Teasdale* (3) and *Roddam* v. *Morley*. (4) He certainly intended to decide according to *Roddam* v. *Morley* (4), and not to decide adversely to *Dickenson* v. *Teasdale*. (3) He commented on those cases, and said (5) that in the event he was justified in holding that the defendants could not plead the Statute of Limitations. Now, that case went on appeal (6) before the Lord Chancellor, who again had before him the cases of *Roddam* v. *Morley* (4) and *Dickenson* v. *Teasdale* (3), and held, reversing the decision of the Vice-Chancellor, that the payment by those entitled to the personal estate was not sufficient to keep the right of action alive against the real estate. A decision under those circumstances deserves far more consideration, as it seems to me, than a mere expression of opinion, however necessary for the purposes of the case, by a Court of Appeal or any judges of a Court of Appeal. I must look at the decision with reference to all the circumstances which led to it, and, seeing that these cases were before the Court, and that the Vice-Chancellor's decision on them was reversed, it seems to me that I have there

(1) L. R. 2 Eq. 106; 2 Ch. 112.
(2) L. R. 2 Eq. at p. 116. The learned judge also specially referred to p. 119.
(3) 1 D. J. & S. 52.
(4) 1 De G. & J. 1.
(5) L. R. 2 Eq. 122.
(6) Ibid. 2 Ch. 112.

KEKEWICH J.

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In re ENGLAND. STEWARD *v.* ENGLAND.

an authority of the very highest character; and though, as at present advised, it is not necessary for me to go so far, I must say that I cannot see the difference in principle between the case decided in *Coope* v. *Cresswell* (1) and the case before me. It is difficult to me to see how, if payment by the owner of the personal estate does not operate to keep the right of action alive as against the real estate, it can in principle be said that payment by the owner of the real estate will keep the right of action alive as against the personal estate. But then, having said that, I come back to the fact that there was in this case no actual payment or actual acknowledgment, but a mere continuance in possession by the person entitled for life to the charge and in fee to the hereditaments charged, and I confess that seems to me to afford a very wide distinction. It has not been deemed improper by the best of judges to say that it would be a satisfaction not to them only, but to the profession at large, if a point of this novelty and difficulty were taken to the Court of Appeal. Following the expressions I have myself heard from many of my learned predecessors, I venture to say that, in view of the numerous cases, not all easy to apply to the matter in hand, which have been cited before me, there would be some advantage in having the matter threshed out before a higher tribunal. For myself, I must hold that the statute is a bar to the claim against the personal estate.

Solicitors: *Rhodes & Son; S. W. Johnson & Son; Blount, Lynch & Petre.*

(1) L. R. 2 Eq. 106; 2 Ch. 112.

C. C. M. D.

ALLIOTT *v.* SMITH.

KEKEWICH J.

[1894 A. 939.]

1895. April 5.

Practice—Interrogatories—Sufficiency of Answers—Agents of Testator—Executor, how far bound to inquire.

When a man is interrogated about acts done in the presence of persons employed by him, their knowledge is his knowledge, and he is, therefore, bound, in order to enable him to answer, to make inquiry of those persons; and the rule applies, not only where the persons so employed are servants or workmen, but also where they are bankers or solicitors.

But the rule was held not to apply to an executor interrogated as to whether trust funds alleged to have been received by his testator had been paid by the latter to his bankers or solicitors at a period twenty years prior to his death, inquiry as to the transactions of a testator at so remote a period not being one of the duties of an executor.

THIS was an action by the trustees of a marriage settlement against the executor of the husband to recover a portion of the trust funds alleged to have been advanced to the husband.

By the settlement, which was dated July 21, 1863, certain property of the wife was settled upon trusts in favour of the husband and wife and the issue of the marriage; and the trustees were empowered at any time during the life of the wife, upon the request in writing of herself and her husband, to advance and pay to the latter any part of the trust funds, not exceeding one-fourth, for his "advancement either in business or otherwise."

The statement of claim alleged that in 1872 and 1873 the trustees, at the written request of the husband and wife, paid to the husband sums amounting in the whole to 2943*l.*, being one-fourth of the trust funds; that the sums so paid were, immediately after they were received by the husband, invested by him in securities in the names of himself and his wife, and that the same or the greater part thereof remained so invested, or invested in the name of the husband alone, until his death. It was also further alleged that the husband and wife's written request was a mere device to enable them to withdraw a portion of the trust funds from the settlement; that the funds so paid to the

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husband were not required by him for the purpose of his advancement in business or otherwise, nor was it ever intended that the same should be so used.

The wife died in June, 1893, without issue, and the husband died in October, 1893, having by his will appointed the defendant his executor.

The plaintiffs claimed a declaration that so much of the investments standing in the name of the husband as represented the 2943*l.* were subject to the trusts of the settlement, and to have the same transferred to the plaintiffs as trustees of the settlement; an inquiry as to what investments standing in the name of the husband at the date of his death represented the 2943*l.*, and as to what income had been received therefrom since his death; also discovery, and other relief.

The plaintiffs delivered interrogatories to the defendant asking him (amongst other things) whether in the years 1872 and 1873 the husband kept a banking account with a firm of bankers at Grantham, and employed a certain firm of solicitors to act for him; also whether the husband received the trust funds in question at the times mentioned and paid the same, or some and what part thereof, to the credit of his said banking account or to his said solicitors, or how he dealt therewith; also whether the defendant could ascertain from an examination of the husband's said banking account and of his account with his said solicitors, or by inquiry of his said solicitors or otherwise, and, if so, to state what investments were made and in whose name or names by the husband with the moneys so received by him, or how the moneys were dealt with, and, so far as possible, trace the subsequent dealings with such investments and moneys down to the date of his death; and whether the defendant had in his possession or under his control any of the husband's pass-books for 1872 and 1873.

In his affidavit in answer to the interrogatories the defendant stated that he did not know, and was unable to say, whether the husband in 1872 and 1873 kept a banking account with the firm of bankers named or with any other bank, or whether the firm of solicitors named acted during those years as his solicitors; that he, the defendant, did not know and was unable to state

whether the husband received from the trustees the trust funds in question or any other sums, or whether he paid them into his alleged banking account or to his alleged solicitors, or how he dealt therewith; that he, the defendant, did not know and was unable to state what had been done with the trust funds alleged to have been received by the husband, or whether he could acquire such knowledge from any examination of the alleged banking account (if any), or of the account (if any) with the alleged solicitors, or by inquiry of the alleged solicitors, or otherwise; and that he, the defendant, had no such accounts in his possession or under his control; and he submitted that he was in no way bound to make such examination or inquiry. The defendant further stated that he had not in his possession or under his control any of the husband's pass-books for 1872 and 1873.

The plaintiffs then applied in chambers, on the ground of the insufficiency of the affidavit, for an order on the defendant to file a further affidavit in answer to the interrogatories; but the application was dismissed with costs.

The plaintiffs now moved to discharge that order, and for an order on the defendant to file a further affidavit.

The main question was whether the defendant was bound to inquire whether his testator had any bankers or solicitors in the years 1872 and 1873, and if so, whether the money in question had passed through their hands.

H. Terrell, for the plaintiffs. The defendant's answer is insufficient. It is not sufficient for a defendant to say, when interrogated, that he cannot give the information asked for, unless he goes on to say that he has also made inquiry and cannot get the information. He cannot set up ignorance of matters as to which he has plainly the means of information, whether it is from workmen in his employ, or from bankers or solicitors: in such cases he is bound to obtain the information from those sources, or must shew some sufficient reason for not doing so: *Stuart* v. *Lord Bute* (1); *Attorney-General* v. *Rees* (2); *Bolckow, Vaughan & Co.* v. *Fisher*. (3) So here, I submit that the

(1) 11 Sim. 442. (2) 12 Beav. 50. (3) 10 Q. B. D. 161, 167, 171.

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defendant is bound to inquire who were the testator's bankers or solicitors, and what was done with the money, so as to enable us to trace it.

Borthwick, for the defendant, was not called upon.

KEKEWICH J. If this case depended upon any alleged distinction between servants and agents on the one hand, and bankers and solicitors on the other, I should be disposed to follow Mr. Terrell's argument. I see no reason why a person should not be bound to make inquiry of bankers and solicitors acting for him, just as much as he is bound to make inquiry of any workman employed by him. The principle in *Bolckow, Vaughan & Co.* v. *Fisher* (1) is entirely supported by North J. in *Rasbotham* v. *Shropshire Union Railways and Canal Co.* (2), where he says (p. 113): "If a man is interrogated about acts which are done in the presence of persons employed by him, their knowledge is his knowledge, and he is bound to answer in respect of that." In my opinion, that principle is applicable directly to a banker or a solicitor—to a banker who keeps accounts, or to any other man keeping his accounts. So, where a solicitor does business for a client, he does it for his client—he does his client's business. But I do not think that carries Mr. Terrell so far as is required.

The settlement, which is dated in 1863—and the date is important—empowers the trustees, at any time during the life of the wife, upon the request in writing of herself and her husband, to advance and pay to the latter any part of the trust funds, not exceeding one-fourth, for his "advancement either in business or otherwise." According to the allegations in the statement of claim, which I must treat, for the present purpose, as correct, the trustees advanced considerable sums out of the trust funds to the husband as long ago as 1872 and 1873: and it is alleged that the advances were not made in pursuance of the power in the settlement, but that the moneys were given to the husband, though not for the purpose of his advancement in business "or otherwise." As to whether the moneys properly passed to the husband under the words "or otherwise," I say

(1) 10 Q. B. D. 161. (2) 24 Ch. D. 110.

nothing. But it is alleged that he invested the money in the names of himself and his wife, or in his own name alone, and that it remained so invested until his death. Further it is alleged that, the advances having been made in 1872 and 1873, the husband lived until October, 1893; and then, some twenty years after the alleged advances, this claim is made against the husband's legal personal representative, and he is interrogated as to these advances. He says, in answer, "I do not know whether the husband kept a banking account in 1872 and 1873, or who acted as his solicitors during those years." It is said that he is bound to make inquiry of the bankers of his testator and of the solicitors to his estate: in other words, that he is bound, as legal personal representative, to ascertain now what was done with his testator's property twenty years ago. Of course he is bound to know what his testator's estate consisted of at the death, for that was necessary to enable him to pass his residuary account before the Inland Revenue Department, and he is also bound, if necessary, to vouch his accounts of the estate if it should be administered in the Chancery Division; but surely it would be a great hardship upon the legal personal representative of a testator who was entitled, say, to a sum of Consols, to require him to find out who transferred the Consols to him. That does not appear to me to come fairly within his business as legal personal representative. I think it would be a great hardship upon the legal personal representative in the present case if he were bound to make the inquiry asked for. There is nothing in the answers to the interrogatories to shew that this inquiry would produce any advantageous result. In my opinion, the plaintiffs are not entitled to make an oppressive use of this engine of discovery in order to compel the defendant to answer.

I therefore refuse the motion, and the defendant will have his costs of it in any event.

Solicitors: *J. Fawcett; Collisson & Prichard.*

G. I. F. C.

ROMER J.
1895
April 5.

In re WYLIE.
WYLIE *v.* MOFFAT.

[1894 W. 3292.]

Will—Married Woman—Married Women's Property Act, 1893 (56 & 57 *Vict. c.* 63), *s.* 3—*Wills Act*, 1837 (1 *Vict. c.* 26), *s.* 24.

Sect. 3 of the Married Women's Property Act, 1893, applies to every will of a married woman who dies after the date of the Act.

SUMMONS taken out by the plaintiff, as the surviving executor of Anne Wylie, for the determination of the question whether the will and codicil of the testatrix operated, in the events which had happened, to pass the personal estate of which the testatrix was at her death possessed, besides such (if any) as was her separate estate at the time of making the will and codicil, and who in the events which had happened were the persons entitled thereto.

The question depended upon the construction to be put on s. 3 of the Married Women's Property Act, 1893, which enacts that "section 24 of the Wills Act, 1837, shall apply to the will of a married woman made during coverture whether she is or is not possessed of or entitled to any separate property at the time of making it, and such will shall not require to be re-executed or republished after the death of her husband."

The material facts were as follows:—

In the month of July, 1834, Anne Wylie, then Anne Moffat, spinster, married William Michael Wylie. She made her will dated January 13, 1862, and a codicil thereto dated February 28, 1884. Her husband died in 1887.

The testatrix never re-executed or republished her will and codicil, or either of them, after the death of her husband. She died in May, 1894, and her will and codicil were proved in August, 1894, by the plaintiff, the then sole surviving executor.

The testatrix was at her death entitled to considerable property, including property which was not her separate property at the time of making her will and codicil, and which consisted of certain investments held by the trustees of her marriage settlement upon trust to pay the income thereof to her for life,

and then to her husband for his life, and on the death of the survivor upon trust, in the events (which happened) of there being no issue of the marriage and of her surviving her husband, for herself absolutely (but not for her separate use), and also of certain moneys being her savings out of her life interests under the settlement.

Under the will and codicil, and in the events which happened, the defendant Herbert Charles Moffat, an infant, was the person entitled to the property comprised in the will and codicil if they could take effect.

Davenport, for the plaintiff.

Farwell, Q.C., and *F. L. Wright*, for the infant defendant. The section applies to every will of a married woman made during coverture who dies, as this testatrix did, after the coming into operation of the Act: *In re Bridger* (1); *In re Bowen.* (2)

Byrne, Q.C., and *Clauson*, for the defendant, William Moffat, one of the next of kin of the testatrix, appointed to represent the class. The section cannot affect an instrument already executed and completed. It can only refer to wills made after the passing of the Act.

Farwell, Q.C., in reply. Sects. 1 and 2 of the Act both contain the word "hereafter," but the word is not in s. 3.

ROMER J. I am clearly of opinion that the section applies to every will of a married woman who dies after the coming into operation of the Act. The enactment was a beneficial one, and it ought not to be cut down without some very potent reasons, and I see no reason for so doing. I am asked to construe the section as if the words "made after the passing of this Act" were contained in it; but there is nothing to justify the insertion of any such words. I shall, therefore, declare that all the testatrix's estate, whether separate or otherwise, passed by the will and codicil.

Solicitors: *Edward F. Turner; Stileman, Neate & Toynbee, for Toynbee, Larken & Toynbee, Lincoln.*

(1) [1894] 1 Ch. 297. (2) [1892] 2 Ch. 291.

G. M.

ROMER J.

1895

March 26, 27; *April* 9.

ROBSON *v.* SMITH.

[1894 R. 1267.]

Company—Debenture—Floating Security—Garnishee Order.

The holder of a debenture constituting only a floating security while the company is carrying on business cannot, if the company has not been wound up and a receiver has not been appointed, require by notice that a particular debt owing to the company shall be paid to him or not to the company; and a fortiori, if a garnishee order absolute has been obtained attaching the debt, the garnishee may pay it to the judgment creditor notwithstanding any such notice.

Words in a debenture prohibiting a company from creating a prior "charge" are to be read strictly, and do not extend to defeat the rights obtained under a garnishee order.

W. J. Robson was the holder for value of a debenture dated December 4, 1889, whereby the Empire Printing and Publishing Company, Limited, became bound under its common seal to pay to the bearer on presentation of the debenture—on June 4, 1890, or at the expiration of six calendar months after the bearer should by notice in writing to the company have required it so to do, or on such earlier day as the principal sum thereby secured should become payable in accordance with the conditions indorsed thereon—the sum of 3000*l.*, and to pay interest in the meantime. And the company thereby charged with such payments "its undertaking, and all its real and personal property (both present and future), including its uncalled capital for the time being."

The debenture was expressed to be subject to the indorsed conditions, of which the following are material:—

"(*a.*) The charge created by the said debenture is to be a floating security upon the real and personal property (both present and future) of the company, but so that the company shall not be at liberty to create any mortgage or charge upon any such property in priority to the said debenture. . . ."

"(*c.*) The principal sum secured by the said debenture shall immediately become payable (1.) if the company makes default for twenty-eight days in the payment of any interest thereby

secured, and the bearer, before such interest is paid, by notice in writing to the company, calls in the said principal sum; or (2.) in case the company, before the said principal sum and all interest for the same shall be fully paid, shall, by reason of its inability to meet its engagements, suspend payment; or (3.) if an order is made, or an effective resolution is passed, for the winding up of the company."

The company made default in payment of the interest, and on August 23, 1893, Robson recovered judgment under the Rules of the Supreme Court, 1883, Order XIV., r. 1, against the company in an action for 3090*l.* 16*s.* 2*d.*, the principal due under the debenture with interest thereon to July 25, 1893.

On September 5, 1893, a writ of fieri facias was issued on the judgment.

The sheriff, under this writ, levied on the property of the company, and the net proceeds received by Robson from the sheriff amounted to about 1000*l.* only, the sheriff and the landlord of the company having previously been in possession.

G. Walter and J. W. Walter, on September 21, 1893, recovered judgment against the company for about 300*l.*; and Usher & Co., on July 11, 1892, recovered judgment against the company, on which 140*l.* remained due on September 27, 1893.

On September 27, 1893, G. Walter and J. W. Walter obtained a garnishee order nisi directing T. J. Smith, Son & Downes, who owed the company 200*l.* for goods sold and delivered, and also a further debt, to attend on October 4, 1893, on an application by G. Walter and J. W. Walter that the garnishees should pay the debt due from them to the company.

On the same day a similar order, also returnable on October 4, 1893, was obtained against Smith, Son & Downes, by Usher & Co.

On September 28, 1893, Robson, in respect of his judgment, obtained a similar order against Smith, Son & Downes, returnable on October 5, 1893.

On October 4, 1893, G. Walter and J. W. Walter and Usher & Co. obtained garnishee orders absolute against Smith, Son & Downes, the order in each case following the form in Appendix K., 40, to the Rules of the Supreme Court, 1883, by

ROMER J. 1895 ROBSON v. SMITH.

directing the garnishees forthwith to pay the judgment creditors the debt due from the garnishees to the judgment debtors, and that execution should issue in default of payment.

On October 5, 1893, Robson obtained a garnishee order absolute against Smith, Son & Downes, which directed that the garnishees should, after the two garnishee orders absolute of October 4, 1893, had been satisfied, pay Robson any balance of the debt due from the garnishees to the company, and that in default execution should issue.

On October 10, 1893, Robson gave notice in writing to Smith, Son & Downes of his debenture, and that under it he claimed to be entitled to all debts owing or accruing due from them to the company, and that they were not to pay the debts either to any judgment creditors of the company other than Robson, or to any other person except himself.

The priority of the debt of G. Walter and J. W. Walter over that of Usher & Co. was afterwards established, and Smith, Son & Downes paid G. Walter and J. W. Walter 200*l.*, and paid the balance of the amount owing by them to the company to Robson.

Robson then brought the present action against Smith, Son & Downes, claiming—(1.) a declaration that, by virtue of his debenture, the plaintiff was the assignee in equity of the debt of 200*l.* owing by the defendants to the company, and that by virtue of the notice of October 10, 1893, the defendants as from that date became trustees for the plaintiff of, or otherwise liable to pay to him, the said sum of 200*l.*; (2.) an order for payment of the amount with interest.

At the trial Fraser, the secretary of the company, stated that, when Robson's execution was levied there were other executions against the company; that all its remaining goods and chattels were sold under Robson's execution on about October 5, 1893; that the things seized were taken away; and that about three weeks afterwards the company's business premises and office were closed; that its registered office was then changed to another locality; and that after this, though no printing or publishing was done at the new office, the company completed several orders of customers which had been previously taken. The company went into voluntary liquidation in October, 1894.

The action was tried before Romer J. on March 26 and 27, 1895.

Rowden and *Paice*, for the plaintiff. The debenture created a general charge on the company's assets including the trade debts owing to it, and after receiving notice of the debenture the defendants could not discharge themselves by paying to a judgment creditor, even although he had obtained a garnishee order absolute.

When the company stopped business, as it was compelled to do by the executions under which its movable property was realized, the plaintiff was in the position of an equitable assignee of debts owing to the company.

[ROMER J.:—The plaintiff obtained an order in the Queen's Bench Division under which only the balance of the defendants' debt was to be paid to him.]

The plaintiff only obtained that as a judgment creditor; it does not affect his rights under the debenture.

The company had made default under the debenture, and thereupon the charge, which up to that time had been floating or inchoate, attached to the property so as to prevent the company from dealing with it and the execution creditors from obtaining a good title: *In re Standard Manufacturing Co.* (1); *In re Opera, Limited.* (2)

Moreover, the company prior to October, 1893, had become paralysed and had ceased to be a going concern, and thereupon the plaintiff's title as debenture-holder attached so as to give him the right to stop the company or any execution creditor from receiving a debt owing to the company: *Hubbuck* v. *Helms* (3); *In re Florence Land and Public Works Co.* (4)

The notice to the defendants of the plaintiff's debenture completed his equitable title.

A garnishee order absolute creates no charge on the debt, but is merely a process of execution giving at the outside a lien which is displaced by the prior equitable charge given by the debenture, for the execution creditor can get no further right

(1) [1891] 1 Ch. 627.
(2) [1891] 3 Ch. 260.
(3) 56 L. J. (Ch.) 536.
(4) 10 Ch. D. 530.

ROMER J. 1895 ROBSON v. SMITH.

than the debtor could honestly give him: Edwards on Execution, p. 372.

[ROMER J.:—Suppose the defendants had not paid as directed by the garnishee order absolute?]

The judgment creditors could, if their title had been good, have proceeded to execution; but on the garnishees shewing that they had had notice of the debenture, execution would not have been allowed. Where notice of a prior assignment of the debt has been received by the garnishee, the garnishee order absolute will not justify him in making payment: *Wood* v. *Dunn.* (1) Even in the absence of notice an equitable charge obtained before a garnishee order is made has priority over it: *Ex parte Whitehouse* (2); *Badeley* v. *Consolidated Bank.* (3)

[ROMER J.:—In *Ex parte Whitehouse* (2) the garnishee had not paid the execution creditor.]

If the defendants have to pay the plaintiff, they have only themselves to blame, because they omitted to set in motion the machinery provided by the Rules of the Supreme Court, 1883, Order XLV., rr. 5, 6.

[ROMER J. referred to *Turnbull* v. *Robertson.* (4)]

Neville, Q.C., and *Eve*, for the defendants. The plaintiff is seeking to carry the law in favour of debenture-holders further than it has been carried by any reported cases. In *In re Standard Manufacturing Co.* (5) and in *In re Opera, Limited* (6) a winding-up order had been made. In the absence of specific provision to the contrary a floating security does not become specific until there is a winding-up or a receiver has been appointed at the instance of the debenture-holders: *Brunton* v. *Electrical Engineering Corporation.* (7) In *In re Standard Manufacturing Co.* (5) the debentures expressly took away the right of the company to deal with its property on the happening of any one of several events, two of which did actually take place; and there is nothing in the interlocutory judicial observations in that case which is inconsistent with what has been said as to the

(1) L. R. 2 Q. B. 73, 83, 84.
(2) 32 Ch. D. 512.
(3) 34 Ch. D. 536.
(4) 47 L. J. (C.P.) 294.
(5) [1891] 1 Ch. 627.
(6) [1891] 3 Ch. 260.
(7) [1892] 1 Ch. 434, 440.

effect of a floating security in *In re Horne and Hellard* (1), in Lindley on Companies, 5th ed. pp. 196, 197, and in *Brunton* v. *Electrical Engineering Corporation.* (2)

In the case last cited it was held that debentures containing a clause that the company should "not be at liberty to create any mortgage or charge in priority to the said debentures" did not interfere with the company's business being carried on prior to the appointment of a receiver, and that the debenture-holders could not prevent the company's solicitor, employed by them in the usual course of their business, from acquiring a lien for his costs.

Collapse is not equivalent to a winding-up or the appointment of a receiver, and until one of these things happens the company has a licence to continue its business, and notice of the debenture to one of its debtors does not give the debenture-holder the right to pick out a particular debt as a specific asset belonging to him.

The question what is the effect of payment under a garnishee order absolute after notice of a prior assignment was left open in *Wood* v. *Dunn.* (3) The garnishee can set himself free towards his own creditor by making a compulsory payment: *Mayor of London* v. *London Joint Stock Bank.* (4) Payment under a garnishee order, with the penalty of execution threatened in case of default, is eminently compulsory payment. Moreover, the plaintiff recognised that the payment was valid by taking an order for payment to himself of the balance only. The company could honestly deal with the debt owing from the defendants at the time when the garnishee orders nisi were made, and *Ex parte Whitehouse* (5) is therefore in favour of the defendants.

[ROMER J. referred to *Eisdell* v. *Coningham* (6) and *Cooper* v. *Brayne.* (7)]

Eisdell v. *Coningham* (6) shews that the remedy is against the garnisher.

[They also referred to *In re Colonial Trusts Corporation* (8); *Davis* v. *Freethy.* (9)]

(1) 29 Ch. D. 736.
(2) [1892] 1 Ch. 434.
(3) L. R. 2 Q. B. 73.
(4) 6 App. Cas. 393, 415.
(5) 32 Ch. D. 512.
(6) 28 L. J. (Ex.) 213.
(7) 27 L. J. (Ex.) 446.
(8) 15 Ch. D. 465.
(9) 24 Q. B. D. 519.

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Rowden, in reply. There is no clear decision that a security ceases to be floating only in the cases of winding-up and the appointment of a receiver. It ceases to float and become specific when the company ceases to be a going concern: Palmer's Company Precedents, 5th ed. p. 476.

The decision in *In re Horne and Hellard* (1) turned on the special form of the debentures.

A charge is not created by a garnishee order, whether nisi or absolute: *Ex parte Pillers.* (2)

[ROMER J. If I may say so, Mr. Rowden has argued the plaintiff's case with great ability.]

April 9. ROMER J. delivered judgment as follows:—Debentures like the plaintiff's have been frequently considered by the Courts. They constitute what is called a "floating security"—that is to say, they allow the company to deal with its assets in the ordinary course of business until the company is wound up or stops business, or a receiver is appointed at the instance of the debenture-holders, or, as it has been said (see *In re Standard Manufacturing Co.* (3)), they constitute a charge, but give a licence to the company to carry on its business. So long as the debentures remain a mere floating security, or, in other words, the licence to the company to carry on its business has not been terminated, the property of the company may be dealt with in the ordinary course of business as if the debentures had not been given, and any such dealing with a particular property will be binding on the debenture-holders, provided that the dealing be completed before the debentures cease to be merely a floating security.

In the present case, at the time that the defendants, as garnishees, under the order of the Court paid the debt due to the company, the plaintiff's debenture remained a floating security only. The company was not wound up until many months afterwards. No receiver had been appointed at the instance of a debenture-holder, nor had the plaintiff taken any step, as against the company, to enforce his security or to prevent the

(1) 29 Ch. D. 736. (2) 17 Ch. D. 653.
(3) [1891] 1 Ch. 641.

company from carrying on its business. On the contrary, he had immediately before obtained a judgment against the company for the debt secured by the debenture, and, by way of execution of this judgment debt, had obtained in the ordinary way an order against the defendants, as garnishees, for payment of the balance of their debt to the company remaining after payment to the prior garnishers under the above-mentioned prior order. In this way he recognised the fact that the company was carrying on its business and was entitled to deal with its property in ordinary course. Nor had the company, in fact, even stopped business, and still less had the defendants notice of any stoppage. An attempt was made by the plaintiff to prove that the company had stopped business before the defendants paid the prior garnishers, but this attempt failed. No doubt the company was in difficulties, and executions on judgment debts against the chattels had been enforced, and the chattels sold, and the company had been obliged to change its registered address. But the plaintiff's own witness, Fraser, had to admit that a new address had been registered, and that the company continued for some time afterwards to carry on business; for instance, it completed pending orders, and had printing work done for it by third parties in order to enable such orders to be carried out. The licence to the company to carry on its business implied by debentures of this class had not been withdrawn at the time the defendants made the payments now impeached, nor had the plaintiff or any one else taken any effectual step towards such withdrawal. The notice not to pay that the plaintiff sent to the defendants, after the first garnishee order and before actual payment, was no withdrawal of the licence as between the plaintiff and the company; nor did the notice venture to inform the defendants that the floating nature of the security had been changed, or that any steps had been taken to wind up the company or to get a receiver appointed, or to prevent the company from carrying on its business. The notice sent would have been no justification or valid excuse to the defendants if they had refused to pay under the existing garnishee order, or if they had applied to the Court to set aside or prevent the enforcement of that order. And, if no garnishee order had been in existence, the notice would not have justified the defendants in

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refusing to pay their debt to the company on demand made by the company. The holder of a debenture constituting a floating security only while the company is carrying on its business, and when no steps have been taken to wind up the company or to get a receiver appointed, cannot single out a particular debt due to the company and require by notice that debt to be paid to him or not to be paid to the company or to those validly claiming through the company (see the observations of Stirling J. in *Hubbuck* v. *Helms.* (1)) For these reasons it appears to me that the payment by the defendants to the first garnishers was good as against the plaintiff, and that the plaintiff's action accordingly fails, and I need not consider the other grounds of defence raised on behalf of the defendants. I ought to say that the cases of *In re Standard Manufacturing Co.* (2) and *In re Opera, Limited* (3), relied upon by the plaintiff, are not in point. Those were cases of execution creditors, and in both the winding-up of the company commenced before the sheriff sold, and therefore, before the execution was completed—in other words, before the assets seized by the execution creditors had been completely dealt with so as to give any rights therein to the creditors. I should, perhaps, add that in the present case the plaintiff's debenture contained the not unusual provision that the company should not be at liberty to create any mortgage or charge upon any property in priority to the debenture, but this provision is not material in this action, for garnishee proceedings are only a form of execution, and do not lead to any "charge," in the true sense, being created by the company on the debt garnished. The word "charge" in a provision of this class is construed strictly; for instance, the provision has been held not to prevent the solicitor of the company from asserting his lien in priority to the debentures: see *Brunton* v. *Electrical Engineering Corporation.* (4) The action must, therefore, be dismissed, and with costs.

Solicitors for plaintiff: *Paice & Cross.*
Solicitors for defendants: *Van Sandau & Co.*

(1) 56 L. J. (Ch.) 537.
(2) [1891] 1 Ch. 627.
(3) [1891] 3 Ch. 260.
(4) [1892] 1 Ch. 434.

F. E.

In re OMNIUM INVESTMENT COMPANY.

VAUGHAN WILLIAMS J.

1895

May 1, 8.

[0090 of 1895.]

Company—Reduction of Capital—Alteration of Memorandum—Evidence—Companies Act, 1867 (30 & 31 *Vict. c.* 131)—*Companies Act*, 1877 (40 & 41 *Vict. c.* 26)—*Companies* (*Memorandum of Association*) *Act*, 1890 (53 & 54 *Vict. c.* 62).

Where a petition is presented for the confirmation by the Court of resolutions for reducing a company's capital or altering its memorandum of association, a copy of the memorandum and articles, and the original minute-book of the proceedings of general meetings, should be made exhibits to the affidavit in support of the petition.

And where the reduction is to be effected by cancelling paid-up capital which has not been paid up in cash, it must be proved that the shares were issued pursuant to a contract filed under s. 25 of the Companies Act, 1867.

THE Omnium Investment Company, Limited, presented a petition, intituled in the matters of the Companies Act, 1867, and the Companies Act, 1877, praying for the confirmation by the Court of a special resolution passed by the company for a reduction of its capital by cancelling paid-up capital which had been lost or was unrepresented by available assets.

There was an affidavit in support of the petition proving that the meetings at which the special resolution was passed and confirmed were duly convened, and that the resolution had been passed and confirmed by the requisite majorities of shareholders, but the minute-book containing the minutes of the meetings was not verified.

Farwell, Q.C., and *R. Younger*, in support of the petition.

VAUGHAN WILLIAMS J. Mr. Barnes, the chief clerk to the registrar, calls my attention to *In re Leicester Mortgage Co.* (1) Strictly speaking, the petitioners should prove that notices of the meetings were properly given; but that evidence is dispensed with if it is shewn that the resolution was duly passed and confirmed. Where the minute-book is produced, one would

(1) 38 Sol. J. 564.

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have thought that it would have spoken for itself; but in Palmer's Company Precedents, 5th ed. p. 548, there is the following passage: "The petition should be supported by an affidavit (usually made by the chairman of the directors), proving the facts stated. A copy of the memorandum and articles, and the minute-book of the proceedings of general meetings, should be made exhibits." And in Form 352, paragraph 7, in Palmer's Company Precedents, 5th ed. p. 554, the minute-book is made an exhibit to the affidavit.

I am told that an affidavit in this form is always required in the Registrar's Office, and, as it is much more convenient that one practice should be adopted, you had better exhibit the minute-book to the further affidavit which will be required to shew that any shares which were not paid up in cash were issued in pursuance of contracts filed with the Registrar of Joint Stock Companies under s. 25 of the Companies Act, 1867.

The petition was accordingly adjourned for a week, and came into the paper again on May 8.

Younger (*Farwell, Q.C.*, with him). It has been suggested that it would be convenient if your Lordship would say whether the rule of practice laid down last week applied also in the case of applications under the Companies (Memorandum of Association) Act, 1890.

VAUGHAN WILLIAMS J. Yes; I think the same rule as to evidence of the passing of the resolution ought to be followed in the case of applications under that Act.

Solicitors: *Davidson & Morriss.*

F. E.

MIDLAND RAILWAY COMPANY *v.* GRIBBLE.

WRIGHT, J.

1895

April 9; *May* 11.

[1894 M. 1931.]

Railway Company—Severed Land—Communication by Level Crossing—Severance of Ownership in Lands—Easement—Railways Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 20), *s.* 68.

A railway company provided a level crossing under s. 68 of the Railways Clauses Consolidation Act, 1845, as a means of communication between two portions of the land of R. which had been severed by the railway. R. granted the land on one side to P., and afterwards granted the land on the other side to T., the predecessor in title of G.

P. afterwards released to the company his right to use the crossing. The company having put up fences on their own property obstructing the crossing, G. removed the obstruction:—

Held, that the company was entitled to an injunction to restrain G. from interfering with the fences, but without prejudice to the right (if any) of G. or his successors, in case they should be entitled, under or as against the owners or occupiers for the time being of the other part of the severed lands, to pass over or use those lands in connection with their own lands.

THE plaintiffs in 1855 by constructing their railway severed the land of one Raynsford, and so incurred the duties imposed by the Railways Clauses Consolidation Act, 1845, to provide and maintain communication between the severed parts. An arbitration as to the purchase-money and compensation took place in the usual way, and by consent the umpire settled the crossings to be provided by the plaintiffs for the accommodation of the severed lands under s. 68 of the Act. The conveyance by Raynsford to the plaintiffs gave effect to the award by reserving to "Raynsford and other the owner or owners for the time being in succession to him" of the severed lands (inter alia) a crossing "with all proper gates, fences, and approaches" "to be made and for ever maintained by and at the expense of the company, their successors and assigns," for the use of "Raynsford and other the person or persons aforesaid, and his and their tenants, workmen and servants, cattle, carts, and carriages."

A different crossing was afterwards substituted, and was the

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one now in question in the present action; but no question was raised as to the effect of the substitution.

For thirty years after the construction of the crossing Raynsford and his successors in title continued to be owners of both parts of the severed lands, and the crossing was duly maintained by the plaintiffs.

In 1885 all the lands were put up by Raynsford for sale in separate lots by auction, with the concurrence of his mortgagees, the Alliance Bank. The lands on the west side of the railway were sold to one Plowman at the auction and duly conveyed. No reference was made to the crossing in question at the time of the sale or conveyance.

In 1888 the Alliance Bank sold and conveyed the other lands on the east side to one Thompson, under whom the defendant claimed. In 1893 Plowman, as owner of the lands on the west side, released to the plaintiffs all his right to the use or maintenance of the crossing in question, and all the benefit of the reservation or covenant relating to it in the conveyance. The plaintiffs thereupon, conceiving the right to be extinguished for all purposes, erected fences on their own land across the approach to the crossing. The defendant, asserting a continuing right, removed the obstruction; and the plaintiffs brought this action to restrain the defendant from interfering with their fence and from coming on their line. The action was tried on April 9, 1895.

Neville, *Q.C.*, and *Sargant*, for the plaintiffs. The making of the railway involved the severance of one part of Raynsford's land from the other, and the intervening strip taken by the plaintiffs was conveyed to them subject to the crossing reserved by the conveyance and the express obligation created by the plaintiffs' covenants to maintain and repair. The rights under this deed only enure for the benefit of the one owner of land on both sides of the line at the point where the crossing exists.

When the two severed portions ceased to belong to one owner, the right to communication between them probably ceased, the cesser of right occurring either when Plowman purchased the land on one side, or when Thompson, the defendant's predecessor in title, purchased the land on the other side; for neither of

them in terms purchased the right to cross to the other person's land. Indeed, the vendor could not have granted Thompson the right to go on Plowman's land.

But the plaintiffs' case does not rest on this argument alone; for supposing the effect of the conveyance to Plowman gave the latter the right to cross to the land opposite, this right was released in 1893 to the plaintiffs. The position, therefore, is, that the defendant's predecessor never acquired any right to cross to Plowman's land; and that if Plowman ever had the right to cross to the defendant's land he has given it up.

[WRIGHT, J. Would not the right of communication belonging to one owner of both lands under the conveyance be distributed in case of a partition or conveyance of the land to different persons? What are the terms of s. 68 of the Railways Clauses Consolidation Act, 1845?]

[*Hopkinson, Q.C.*, referred to *Newcomen* v. *Coulson.* (1)]

Sect. 68 says: "The company shall make and at all times thereafter maintain the following works for the accommodation of the owners and occupiers of lands adjoining the railway; (that is to say) such and so many convenient gates, bridges, arches, culverts, and passages over, under, or by the sides of or leading to or from the railway as shall be necessary for the purpose of making good any interruptions caused by the railway to the use of the lands through which the railway shall be made."

But the section only confers a statutory right of communication for the purpose of minimising the inconvenience caused by the severance; and when the severed portions cease to belong to one person the purpose ceases, for an easement granted by statute apparently in absolute terms may be limited in effect to the particular purposes for which it was granted: *National Manure Co.* v. *Donald.* (2)

[WRIGHT J. After the conveyance to Plowman the vendor could not use the right of way without Plowman's consent.]

No. And the owner of the land on the other side, if he could cross the line at all, could only gaze at Plowman's land, which is not a privilege which was in the contemplation of the legislature.

If the severed lands came again into the hands of one person

(1) 5 Ch. D. 133. (2) 28 L. J. (Ex.) 185.

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and the right revived, it would be a new right never purchased from the company.

Hopkinson, Q.C., and *C. G. O. Bridgeman*, for the defendant. The reservation is to the owner " or owners " for the time being, and contemplates that the easement shall be enjoyed notwithstanding different parts of the land vest in different persons.

Where a general right of way is granted, the way may be used for purposes other than that which was contemplated at the time of the grant: *Newcomen* v. *Coulson.* (1) A highway which is a thoroughfare does not cease to be a highway because an obstruction lawfully created has turned it into a cul-de-sac: *Reg.* v. *Burney.* (2)

There is no restriction that the communication by means of a level crossing is to be only such as is necessary for convenient enjoyment of severed lands in the exact state in which they were when the crossing was made: *United Land Co.* v. *Great Eastern Ry. Co.* (3) A level crossing stands in the same legal position as a bridge over the line. Plowman's release did not relieve the company of its obligations under the section: *Corry* v. *Great Western Ry. Co.* (4) There has been no abandonment of the right of way: *Bower* v. *Hill.* (5) [They also referred to *Manchester, Sheffield and Lincolnshire Ry. Co.* v. *Wallis* (6); *Midland Ry. Co.* v. *Daykin.* (7)]

Neville, Q.C., in reply.

1895. May 11. WRIGHT J. delivered judgment, in which, after stating the facts, he continued as follows:—The first question is whether the rights of the parties depend simply on the conveyance or on the statute. The proper construction of the conveyance seems to me to be that while it substituted for the ordinary statutory form of procedure an award or agreement as to the description and situation of the crossing to be provided, it intends that the right shall be of the same nature and legal effect as if it had depended wholly on the statute. What, then, is the nature of the right and obligation created by the statute?

(1) 5 Ch. D. 133.
(2) 31 L. T. (N.S.) 828.
(3) L. R. 10 Ch. 586.
(4) 7 Q. B. D. 322.
(5) 1 Bing. N. C. 549, 555.
(6) 14 C. B. 213.
(7) 17 C. B. 126.

The right is a double one—a right to the use of the crossing and a right to have the track of the crossing kept in proper condition and free from obstruction. I think the latter part must go with the other, for the sake of which it exists, and that the only question is whether or not the plaintiffs' obligation has been suspended or extinguished in the events which have occurred.

The 68th section of the Railways Clauses Act, 1845, contains four sets of provisions—the first relating to crossings, the three others to fencing and drainage and watering-places. I conceive that the last three sets of provisions might in many cases after severance of ownership continue to be applicable in favour of the respective owners of parts of the severed lands for the time being. But the first set of provisions, which is now in question, is limited to such crossings and other communications "as shall be necessary for the purpose of making good any interruptions caused by the railway to the use of the lands through which the railway shall be made." That appears to refer to an assumed condition of things in which the severed lands may, for ordinary purposes connected with the existence of a need of communication at the time of severance, require the means of intercommunication, and that would ordinarily be only where they are in the same ownership and may be in the same occupation. To give a wider effect to the enactment might be to compel the railway company to provide crossings at innumerable places where at the time of the making of the railway no communication was necessary. If some communication was then necessary, a mere alteration in the purposes for which the communication is required will not discharge the railway company's liability: *United Land Co.* v. *Great Eastern Ry. Co.* (1) But if no communication was then necessary, a liability would not afterwards arise from the fact of communication becoming desirable: cf. *Reg.* v. *Fisher* (2); *Reg.* v. *Brown.* (3) This appears to shew that possibility of future need for communication is not enough.

In my opinion, the answer to be given to the question which I have to solve depends not so much on the general doctrine of

(1) L. R. 10 Ch. 586. (2) 32 L. J. (M.C.) 12.
(3) 36 L. J. (Q.B.) 322.

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easements as upon the language and apparent purposes of the Railways Clauses Act, and, instead of asking what right is conferred on the landowner, I prefer to ask, What is the obligation imposed on the company? They have done nothing except to erect a fence on their own land, which they have a right to do unless that primâ facie right is inconsistent with their obligation. What is the obligation? It is that they shall make and at all times maintain and permit to be used for the accommodation of the adjoining owners and occupiers such crossings as shall be necessary—for what purpose?—for the purpose of making good any interruption caused by the railway to the use of the intersected lands. If there cannot be any such use, if its possibility is destroyed either permanently, as by the erection under statutory powers of a prison, or cemetery, or church, or railway station on the other side of the railway, or indefinitely, as by the severance of ownership without reservation of a right of way, the purpose which alone the company are obliged to provide for is extinguished or suspended, and the fence which they then erect on their own land does not interfere with the performance of an obligation which is not then operative. The landowner has, in my opinion, no right to abate the fence unless it interferes with the use of some right of his. But his only right is to have the obligation performed; and so long as there is no obligation to be performed I think that he has no present right, and therefore cannot abate.

It may well be that severance of ownership will not suspend or destroy the obligation or right, if any occasion for intercommunication remains or recurs, whether by reservation or covenant at the time of severance, or even by subsequent grant from one owner to the other; but in the absence of any such occasion it seems unreasonable to hold, e.g., that the company must maintain or rebuild a bridge of which the severed owner can make no use.

This view of the limited nature of the landowner's right, as opposed to an absolute and perpetual easement, seems to me to be confirmed by the language of s. 74, which indicates that the right and obligation exist "solely for the purpose of occupying the same lands."

I think, however, that the obligation and right are so far perpetual that, subject to questions of estoppel and to any equitable considerations, the obligation of the company may and probably will revive in case of the revival of the necessity for communication. It is not necessary now to determine whether this would be so at all, or subject to what, if any, limitations or conditions. The order which, with the plaintiffs' assent, I propose to make will not prejudice the defendant or his successors in this respect.

I should add that, although, as it appears to me, this case must be decided primarily on the construction of the Act, the result will probably be the same if the matter ought to be considered as a case of an ordinary easement arising either by grant or under a statute. I have not been able to find decisions directly in point; but there is at least some authority to the effect that an ordinary easement of way may be suspended when the occasion for it is cut off. See Gale on Easements, 5th ed. at p. 140, et seq., as to ways of necessity; p. 587; and a quotation at p. 630, note (*m*), from the Digest, 8, 6, quemadmod. servitt. amitt. 13. (1)

I think the proper order is to declare that at the material date the defendant had not the right to use the crossing or to abate the obstruction, and to give judgment for 40*s.* damages and an injunction and costs, but without prejudice to any right, if any, of the defendant or his successors, in case they should become entitled under or as against the owners or occupiers for the time being of the other part of the severed lands, to pass over or use those lands in connection with or for the purposes of the occupation of their own lands.

Solicitors for plaintiffs: *Beale & Co.*

Solicitors for defendant: *Gosling, Ingleby, Royds & Rawstorne.*

(1) Marcellus libro xvii. Digestorum.—Si quis ex fundo cui viam vicinus deberet vendidisset locum proximum servienti fundo non imposita servitute, et intra legitimum tempus quo servitutes pereunt rursus eum locum acquisiisset, habiturus est servitutem quam vicinus debuisset.—The same principle is expressed or involved in ll. 14, 15.—F. P.

F. E.

C. A.
1895
KEKEWICH J.
March 8.
C. A.
April 23.

In re BURDEKIN.

Solicitor—Bill of Costs—Taxation—General Order under Solicitors' Remuneration Act, 1881, *Sched. I., Part I., r.* 11—*Scale Charge—Sale of Land by Agreement—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 175, 176.

The exception contained in rule 11 of Sched. I., Part I., of the General Order under the Solicitors' Remuneration Act, 1881, whereby the scale charge is made inapplicable to sales of land under the Lands Clauses Act or any other Act under which the vendor's charges are paid by the purchaser, extends to purchase by agreement by a public body under the powers of such an Act, although the vendor is absolute owner, and although the agreement contains a special clause stipulating that the purchasers shall bear all the vendor's costs as between solicitor and client.

A voluntary purchase by a local authority under the powers of the Public Health Act, 1875, which incorporates the Lands Clauses Act, *held* to be within the rule.

The decision of Kekewich J. affirmed.

By an agreement dated March 1, 1893, and made between Emma Winder (a married woman), thereinafter called "the vendor," of the one part, and the local board for the parish of Handsworth, thereinafter called "the purchasers," of the other part, after reciting that the purchasers proposed to establish, under the powers of the Public Health Act, 1875, and subject to the sanction of the Local Government Board to the purchasers' borrowing the money necessary for defraying the costs, charges, and expenses incurred, or to be incurred, by them in the execution thereof, a scheme for the disposal of sewage within the district of the purchasers, which scheme involved the taking by the purchasers of the land thereinafter described: It was witnessed and agreed that the vendor would sell and the purchasers would (subject to the said sanction of the Local Government Board) purchase for the sum of 500*l.* the fee simple of the two classes of land therein described, reserving the minerals. Then clause 7 was as follows: "All costs and expenses, as well of the vendor as of the purchasers, incurred or to be incurred in or about the preparation and execution of this agreement and the negotiations preparatory thereto, and in or about the preparation of the abstract, and the deducing and verifying of the

title, and in or about the preparation and execution of the conveyance and the duplicate thereof, and of all other documents relating to the assurance of the said premises, and all other costs and expenses (if any) of and incidental to the said sale and purchase, shall be borne and paid by the purchasers (whether the said sanction by the Local Government Board be or be not given), it being one of the terms of this agreement that the vendor shall be put to no expense whatsoever in the matters aforesaid." The agreement was not preceded by any notice to treat to the vendor under s. 18 of the Lands Clauses Consolidation Act, 1845, nor did the agreement contain any express reference to that Act.

The conveyance was ultimately executed in pursuance of the agreement, and in due course Mrs. Winder's solicitors sent in their bill of costs to the local board; but, as the board's solicitors considered the bill excessive and made out on a wrong principle, the bill was eventually carried in for taxation, when the taxing master agreed with the board's contention that, having regard to paragraph 7 of the agreement, Sched. I. of the order under the Solicitors' Remuneration Act, 1881, applied to the case, and taxed the bill on that principle accordingly. The vendor's solicitors then carried in objections to the taxation, on the ground that the case came within rule 11 of the order, and, consequently, that the scale charges under Sched. I. did not apply. (1) The Master, however, overruled the objections on the ground that the sale was a voluntary sale, the land not having been taken compulsorily by the board, and that therefore the case was not one to which rule 11 applied. The vendor's solicitors then took out this summons to review the taxation. The summons was heard before Kekewich J. on March 8, 1895.

Wurtzburg, for the solicitors, relied on rule 11, observing that the purchase had been made under s. 175 of the Public Health Act, 1875, s. 176 of which incorporates the Lands Clauses Consolidation Acts, 1845, 1860, and 1869.

(1) Rule 11 (Annual Practice, 1895, vol. ii. p. 352) provides as follows: "In case of sales under the Lands Clauses Consolidation Act, or any other private or public Act under which the vendor's charges are paid by the purchaser, the scale shall not apply."

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Upjohn, for the local board, contended that the purchase was outside the Lands Clauses Act altogether, and referred to rule 2 (*a*) of the order; Solicitors Act, 1843 (6 & 7 Vict. c. 73), s. 38; Public Health Act, 1875, ss. 7, 27; Lands Clauses Consolidation Act, 1845, ss. 6, 82; *Wombwell* v. *Corporation of Barnsley* (1); *In re Doulton and Metropolitan Board of Works* (2); *In re Stewart.* (3)

KEKEWICH J. The question is whether this is a sale under the Lands Clauses Consolidation Act, or any other public or private Act under which the vendor's charges are payable by the purchaser. If it comes within any such Act the scale does not apply.

The costs provided for by the agreement between Mrs. Winder, as vendor, and the local board for the parish of Handsworth as purchasers, are of a special character. They go beyond what is provided for by the Lands Clauses Act, and are matter of bargain between the parties. It is obvious that the parties had considered what would indemnify the vendor, and clause 7 is intended to prevent any doubt on the subject. That is to say, the local board are to indemnify the vendor against all costs payable by her to her solicitor on the taxation. Of course, that means as between solicitor and client.

Now Kay J., in the case of *In re Stewart* (3), has given a reason why sales under the Lands Clauses Act are excepted from the scale charge. He says that a liberal allowance is made by the 82nd section of the Lands Clauses Act, and that it was not the purpose of this rule to interfere with that liberal allowance. Possibly there was a reason of a somewhat different kind for the exception made by the rule. It may be that those who are responsible for these rules considered, and properly considered, that a solicitor might, in sales under the Lands Clauses Act to public companies, incur costs which would not be covered by the ordinary scale. At any rate, the rule says that sales under the Lands Clauses Act, or Acts of that kind, are not to be included in the scale charges under these rules.

(1) 36 L. T. (N.S.) 708. (2) L. R. 5 Q. B. 333.
(3) 41 Ch. D. 494, 505–6.

I come back, then, to the question whether this is a sale under the Lands Clauses Act. In the first place, I put aside the two cases of *Wombwell* v. *Corporation of Barnsley* (1) and *In re Doulton and Metropolitan Board of Works.* (2) The question in each of those cases was whether certain costs were taxable under a particular section—s. 1 of the Lands Clauses Consolidation Act, 1869, dealing with the costs of arbitration. The question was not whether there was a sale under the Lands Clauses Act, but only whether this 1st section of the Lands Clauses Act, 1869—enacting that where in England under the Lands Clauses Act, 1845, there had been an arbitration, the costs were to be determined by a master of the High Court—applied. The point which I have to deal with here does not seem to have arisen in either of those cases at all, nor do I think that I am in any way assisted by the decision in *In re Stewart* (3), for that decision also does not touch the question raised in this case. Mr. Upjohn's argument is that his clients were competent to buy, and did buy, and that the machinery of the Lands Clauses Act was never invoked in order to ascertain the price. It is possible that the Lands Clauses Act never was in fact invoked; but I take it there is no doubt that this local board could, if they pleased, have purchased the land under the power given by the Lands Clauses Act incorporated in the Public Health Act, 1875, and that, if the vendor had made any difficulty, those difficulties would at once have been got over by proper notices followed up by notice of reference to arbitration, or a jury, as the case might be. But that not having been done, this having been a purchase purely by agreement, is it a sale under the Lands Clauses Act? The board had, no doubt, power to buy land: so has every railway company. Every railway Act enables the railway company to buy, and the Lands Clauses Act is founded upon that. The 1st section enacts that "This Act shall apply to every undertaking authorized by any Act which shall hereafter be passed, and which shall authorize the purchase or taking of lands for such undertaking." Of course a railway company is incorporated with power to purchase and hold land, but they can only do so under their Act; and if they

(1) 36 L. T. (N.S.) 708. (2) L. R. 5 Q. B. 333.
(3) 41 Ch. D. 494.

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go beyond their powers by buying land not wanted for the purposes of their Act, they have no more title than if they were not authorized to hold land at all. It seems to me that the Lands Clauses Act is part of their corporate powers enabling them to purchase lands, even though they do not invoke the aid of the Act. It is to be observed here that the whole of the Lands Clauses Consolidation Act, 1845, is incorporated by s. 176 of the Public Health Act, 1875, with the exception of one section, s. 127, as to the sale of superfluous land. That section is excepted for obvious reasons. It would not be convenient that any land taken by a local board should be open to be reclaimed by vendors or neighbours because it was not wanted for the Act. There would be obvious inconveniences in that, and therefore s. 127 is excepted. But all the rest of the Act is incorporated, with the result that, in the negotiations between local boards and vendors for the sale and purchase of land, it often becomes necessary to consider, among other things, troublesome questions arising, for instance, where there is half an acre not in the town or area of the local board, and so on, or with reference to buildings or manufactories—questions which have given rise to a great deal of litigation. The whole machinery of the Lands Clauses Act comes in, though it can be got rid of, as it has been here and thousands of times before, by an agreement. It seems to me to be impossible to get out of this by saying that, "because we purchased by agreement, which the Lands Clauses Act provides for by s. 6, and have not purchased otherwise than by agreement, which the Lands Clauses Act also provides for, therefore we do not purchase under the Lands Clauses Act."

The Lands Clauses Act provides for the taxation of costs differently from the method provided for by clause 7 of this agreement. This is a special provision, and it is said that, as these costs are different, they are not the costs provided for by the Act, and therefore are not costs coming within the exception to the provision in the agreement. But I do not observe that the rule says anything about the classes of costs to be paid. It only says, "In case of sales under the Lands Clauses Consolidation Act, or any other private or public Act under which the vendor's charges are paid by the purchaser, the scale shall not

apply." It does not say, where there is a special arrangement, or where the costs exceed those provided for, or fall short, or anything of that kind. It says that in all sales under the Lands Clauses Act the scale shall not apply. It was perfectly competent for the local board, subject to the control under which local boards are, to make special arrangements for payment of costs not strictly according to the terms of the 82nd section, whether they purchase by agreement or otherwise; and I think these costs which they agree to pay are costs of a sale or purchase under the Act, notwithstanding they exceed those which the Act gives.

To my mind, this is a point entirely uncovered by any of the authorities cited, and I base my decision on this, that this sale must be regarded as a sale under the Lands Clauses Consolidation Act, notwithstanding that the compulsory clauses were not invoked, that the vendor was willing to sell and has sold, and the local board has purchased by agreement, and not otherwise than by agreement. In my opinion the taxing master must tax the costs according to the terms of the agreement, without the application of the scale.

G. I. F. C.

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From this decision the local board appealed. The appeal was heard on April 23, 1895.

Upjohn, for the appellants. Rule 11 has no application to the present case, for the sale was not made under the Lands Clauses Consolidation Act, or any other private or public Act, but by private agreement. The vendor was absolutely entitled, and did not require any statutory power to enable her to sell or give a good title to the purchasers. The rule only applies to the compulsory sale of lands: *In re Stewart.* (1) And this is made clear by the use of the word "sale," and not "purchase," in the rule. The parties had by their agreement, and especially by clause 7, contracted themselves out of the Act, which they had power to do: *Wombwell* v. *Corporation of Barnsley.* (2) The obligation on the part of the purchasers to pay the vendor's costs

(1) 41 Ch. D. 494, 505. (2) 36 L. T. (N.S.) 708.

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does not arise under the statute, but under the agreement. If it had been under s. 82 of the Lands Clauses Consolidation Act, the summons would have been in a different form: 3 Seton on Judgments, 5th ed. pp. 2044–5. This is in the common form where a bill is taxed by a third party.

Wurtzburg, for Messrs. Burdekin. The case is covered by rule 11. The purchase was made under the Public Health Act, 1875 (38 & 39 Vict. c. 55), which by s. 176 incorporates the Lands Clauses Consolidation Acts, 1845, 1860, 1869. The local board cannot purchase land except under the powers of their Act. The fact that there is a clause in the agreement specially stipulating that the purchasers shall bear all the costs does not make it any the less a sale under the Acts.

Upjohn, in reply.

LINDLEY L.J. This is an appeal from an order made by Kekewich J. The question to be decided is whether a particular clause in an agreement, to which I will refer presently, does or does not entitle the urban authority in this case to have certain costs taxed according to scale. The agreement is an agreement between a Mrs. Winder of the one part, and the local board of Handsworth of the other part; and it is an agreement for the sale to the local board of certain land which they wanted for sewage purposes. The 7th clause is this: [His Lordship read the clause.] The object of that is plain enough. In the first place, be it observed, it is not an agreement between Mrs. Winder and her solicitors; they had nothing to do with it; it is an agreement between her and the local board—an agreement between the purchasers and the vendor to the effect that the purchasers are to pay all the costs of and incidental to this purchase. That is the substance of it. Now, it is necessary to see who the purchasers are, and what powers they have. The purchasers are the local board for the parish of Handsworth. They wanted this land, it is said, for the purposes of sewage, and under the Public Health Act, 1875, under s. 175, and also under s. 27, sub-s. 2, they have power to buy land for the purposes of the Public Health Act, 1875, and it is under the powers of that Act that they are entitled to buy this land—

they had no other right to buy it for any purpose. Sect. 176 of the Public Health Act, 1875, incorporates, amongst other things, the Lands Clauses Consolidation Act; but, as regards the compulsory clauses in it, there is a special provision that the local authority, before putting in force any of the powers of that Act with respect to the purchase and taking of land otherwise than by agreement, shall give certain notices, and so on, and serve a copy of any order; and then there is a provision about a provisional order, and an Act of Parliament confirming it.

That being the position of affairs, and the conveyance having been executed, the question arises how the costs are to be taxed, and reference is made to the general order under the Solicitors' Remuneration Act, 1881, by which power is given to charge according to scale, and the scale is made applicable to certain cases of sales. Then rule 11 in Sched. I. of the rules runs thus: [His Lordship read the rule.]

Now, in this particular case the solicitors for the vendor do not desire to be paid according to the scale; the amount of purchase-money was small—500*l.*—and I suppose it was a troublesome business. We all know when the purchase-money is small the scale is not very favourable to the solicitors. The urban authority contend that these costs are costs to which the scale does apply, notwithstanding the language of the 11th rule, and they put their case in various ways. They first of all say that this is not a case of a sale under the Lands Clauses Consolidation Act, or any other private or public Act under which the vendor's charges are paid by the purchaser. Now, are they right in that? Is this a sale in any sense under the Lands Clauses Consolidation Act, or any other private or public Act under which the vendor's charges are paid by the purchaser? In order to answer that question we must look and see what is the power that is given to the vendor to sell and to the purchasers to buy. The vendor here is seised in fee, and has ample power to sell: whereupon Mr. Upjohn says, that being so, it is not a case of a *sale* under the Lands Clauses Consolidation Act, though it may possibly be a *purchase* under that Act; but inasmuch as the word "sale" is only used in the rules and "purchase" is not, he asks us to interpret that provision as

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confined to sales under the Lands Clauses Consolidation Act or other Acts similar to it by incapacitated persons. He says these are persons who are empowered to sell under the Lands Clauses Consolidation Act, and sales by those persons, and sales by those only, are the sales referred to in rule 11. It appears to me, I confess, that that would be putting a very narrow construction upon this rule, and one which would, to my mind, defeat the object of it. It is true there is the word "sale" only, as is said here, and not "purchase"; but, on the other hand, you cannot have a sale without a purchase, and the word "sale" is put in simply as a compendious term to include the transaction of purchase and sale. In this particular case the vendor appears to be seised in fee, and does not want the Lands Clauses Act to convey; yet the purchasers do want the Lands Clauses Act to enable them to buy, and the purchase is a sale within rule 11.

The next point is whether upon the true construction of the Public Health Act, 1875, this is a sale under the Lands Clauses Consolidation Act, or any other private or public Act under which the vendor's charges are paid by the purchaser. At first I felt a little difficulty about that; but on looking into the Public Health Act it is obvious, I think, that the local board had no power to buy at all except under the Public Health Act, and that the Public Health Act incorporates the Lands Clauses Consolidation Act, and that the joint effect of the two is that the vendor's charges are to be paid under those Acts by the purchaser. It appears to me, therefore, that the learned judge was right in saying that the last words of rule 11 are applicable to this case—that is to say, that it is a case of "a sale under the Lands Clauses Consolidation Act, or any other private or public Act under which the vendor's charges are paid by the purchaser."

Then, if he is right in that, which I think he is, what is the effect of it? Mr. Upjohn says if you look at the agreement the agreement is inconsistent with that view. The agreement applies to all sorts of costs which are not provided for under the Lands Clauses Act, which is incorporated into the Public Health Act. In order to deal with this argument of inconsistency,

you must find something in the agreement to the effect that the scale shall apply. The rule as interpreted, and as properly interpreted, says that the scale is not to apply. What is there in the agreement which justifies the inference that the scale is to apply? Nothing at all. It appears to me, therefore, that the view taken by Kekewich J. is the right one, and that the appeal ought to be dismissed.

LOPES L.J. I am of the same opinion. The question is whether these costs are to be taxed according to the scale. It is contended by the appellants that they are to be so taxed. That question depends upon the words at the latter end of rule 11 of the rules under the Solicitors' Remuneration Act to which allusion has been made.

With regard to the words "In cases of sales under the Lands Clauses Consolidation Act, or any other private or public Act," it appears to me that most clearly that portion of this rule is inserted because, according to the 175th section of the Public Health Act, 1875, the power under which the appellants, the local board, are entitled to purchase this land arises in this way. The words are, "Any local authority may for the purposes and subject to the provisions of this Act purchase or take on lease sell or exchange any lands, whether situated within or without their district," and so on. Therefore, it is perfectly clear, subject to a point to which I will allude presently, that this is a sale under a private or public Act—there can be no question about that. But then the words follow, "under which the vendor's charges are paid by the purchaser." For a long time I felt some difficulty about that; but it seems that objection is answered by s. 176 of the Public Health Act, 1875, which section incorporates the Lands Clauses Act; and, taking the two sections together, it amounts to this—that we must read the Public Health Act as if the Lands Clauses Act was set out at full length in that Act; and if it had been set out at full length in that Act, nobody would have any doubt that the words "under the Lands Clauses Consolidation Act, or any private or public Act under which the vendor's charges are paid by the purchaser," would be complied with; because according to the

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82nd section of the Lands Clauses Act provision is made with regard to costs.

But then a point was taken that a portion of the agreement, namely, clause 7, is inconsistent with that view. No doubt that portion of the agreement covers more than would be covered by the statute; but I am unable to see that there is anything in that inconsistent with the exclusion of the scale. I do not doubt for one moment that words might have been introduced which would have been sufficient to meet the view which has been suggested with regard to contracting out of the Act; but I can find nothing of that kind in that portion of the clause itself.

Then it is said that the word "sale" used in rule 11 does not include "purchase." That, I think, would be a great deal too narrow a construction to put upon it. Then it was said that it only refers to cases where the vendor had a limited interest only. That again, I think, would be too narrow a construction to put upon it. I read the words "In cases of sales" as if the words had been, "In cases of transactions under the Lands Clauses Consolidation Act, or any other private or public Act." The view I take of rule 11 is this—that it was the intention of the rule that where the costs were provided for by any statute then the scale should not apply. I think that the learned judge was right in the view which he took.

KAY L.J. I have come to the same conclusion. The question is one of some little complexity, and one has to consider carefully the Act of Parliament and this rule. The question, first of all, is whether this is "a sale under the Lands Clauses Consolidation Act, or any other private or public Act," as is referred to in the rule. So far as the purchasers are concerned, they are a corporation who admittedly are buying this land under the powers conferred upon them by the Public Health Act; therefore, at any rate, it is a purchase under the Public Health Act, and that Act incorporates the Lands Clauses Act, and, therefore, incorporates s. 82, which does provide for the payment of costs by the purchaser of such land. So far, it seems very clear indeed that these words excluding the scale apply to this

particular case. But then it is argued that the rule only applies in terms to the case of a sale under the Act, and not to the case of a purchase under the Act. I confess I am not able to agree with that argument. It would be a very limited construction indeed of this rule if it were held, as it was argued it should be held, that it only applied to the case of a limited owner who obtained power to sell under such public or private Act, or under the Lands Clauses Act. Take the case of an agreement between a railway company and an owner in fee simple. I have no doubt whatever that s. 82 of the Lands Clauses Act applies to the case of an agreement of that kind where the agreement is entirely silent as to costs; otherwise you could only come to this conclusion, which certainly seems to me inconsistent with the scope and spirit of the Lands Clauses Act, that in such a case, if the agreement were silent as to costs, each party must pay his own costs; and I cannot think that was the meaning of the Lands Clauses Act. I therefore think that in this case the word "sale," as used in this rule, includes "purchase" as well as "sale," and means, as Lopes L.J. has said, the whole transaction of buying and selling as between the vendor and the purchaser; and where the costs of that transaction are provided for by any public or private Act under which the sale takes place, then the scale is not to apply.

So far, it seems to me the case is quite plainly made out. But then Mr. Upjohn says that clause 7 of this agreement is so entirely inconsistent with the provisions of the Lands Clauses Consolidation Act as to costs that it amounts to an exclusion of that Act, and a contract between the parties to pay costs independently of the provisions of that Act of Parliament. Now, in the first place, the answer to that is, that in this clause 7 there is not a word of exclusion; there is nothing in this clause to say that the provisions of the Act as to costs are not to apply. In truth, the object of the clause is entirely different. It undoubtedly goes very much beyond the provisions of the Lands Clauses Act, because, in point of fact, it provides that all the costs relating to the transaction as between solicitor and client are to be paid by the purchaser, which is more than he would have to pay under the provisions of the Lands Clauses Act. But

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why is that to be treated as so entirely inconsistent with those provisions as to exclude them? I confess I cannot see that it comes to more than this: besides the costs which the purchaser otherwise would have to pay, we agree that the purchaser shall in this case pay other costs—in fact, the costs which the vendor would have to pay to his own solicitor, so as to completely indemnify his vendor. There is not such an inconsistency in a clause of that kind as to enable us to say that the provisions of the Lands Clauses Act are excluded. Consequently, I think the decision of the learned judge was quite right, and the appeal must be dismissed with costs.

Solicitors: *Crowders & Vizard; Torr & Co.*

M. W.

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STIRLING J.
Nov. 17; *Dec.* 18.
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STEPHENS *v.* GREEN.
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Incumbrance—Priority—Personal Estate—Assignment of Equitable Interest—Original and Derivative Trust—Notice to whom to be given—Post-nuptial Settlement—Covenant to settle After-acquired Property—Mutual Covenants—Valuable Consideration.

A son was entitled under the will of his father to a contingent interest in a fund paid into Court in an action to administer the father's estate. The son died while the interest was still contingent, having bequeathed a share of such interest to his daughter who assigned such share successively to A. and B. B., who had no notice of A.'s assignment, obtained a stop order on the fund in Court. A. gave notice of his assignment to the son's legal personal representative.

Upon the interest falling into possession:—

Held, that for the purpose of determining the priority between A. and B. the stop order had the same effect as notice to the father's executors would have had if the fund had not been in Court; that the proper person to receive notice of the assignments was the trustee of the assignor, namely, the legal personal representative of the son; and that, consequently, A. had priority over B.

In re Booth's Settlement Trusts (1 W. R. 444) overruled.

Bridge v. *Beadon* (L. R. 3 Eq. 664) observed upon.

Holt v. *Dewell* (4 Hare, 446) followed.

A post-nuptial settlement made in order to avoid proceedings for contempt being taken against the husband, who had married a ward of Court without leave, contained a covenant to settle the wife's after-acquired

property and a covenant by the husband to pay the premiums on a policy of assurance which he had assigned to the trustees of the settlement :—

Held, that there was sufficient consideration for the covenant to settle the wife's property, and that it was capable of being enforced by the Court.

PETITION.

Henry Armel Green was entitled under the will of his father, Henry Green, who died in 1841, to a contingent interest in a fund set apart for the testator's daughters, upon the death of either of them without leaving issue who should attain the age of twenty-one.

In the suit of *Stephens* v. *Green*, which was instituted for the administration of the father's estate, the fund in question was paid into Court to the credit of the cause.

Henry Armel Green died in April, 1866, while his interest in the fund was still contingent, having by his will bequeathed his residuary estate subject to the payment of his funeral and testamentary expenses and certain legacies to J. W. Knight, whom he appointed executor of his will, in trust for his children, who, being sons, should attain the age of twenty-one, or, being daughters, should attain that age or marry. He left three children, namely, two sons and a daughter named Alice Green.

The suit of *Green* v. *Knight* was instituted for the administration of the estate of Henry Armel Green, and was heard on further consideration on November 23, 1868, when directions were given for the payment of the costs of the suit, of the testator's debts, and of the legacies bequeathed by his will, and it was ordered that such part of the testator's personal estate as was in the chief clerk's certificate mentioned to be outstanding should be got in by the defendant J. W. Knight, and that such proceedings should be taken for that purpose as the judge should direct. In pursuance of this order the costs of the suit and the debts of the testator were duly paid; but, in consequence of the insufficiency of the testator's estate, the legacies given by his will were only paid to a small extent. No further steps were taken in the suit of *Green* v. *Knight*. The outstanding estate referred to in the order included the contingent reversionary interest of Henry Armel Green in the legacies bequeathed by his father's will to

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or for the benefit of his sisters, but no probate duty had been paid on such outstanding estate.

On May 13, 1878, Alice Green, while still an infant and a ward of Court, intermarried with John O'Connor without having obtained the consent of the Court.

On June 22, 1878, after the wife attained the age of twenty-one, a post-nuptial settlement was obtained from the husband under pressure from the friends of the wife, who threatened to take proceedings against him for contempt in marrying a ward of Court without the sanction of the Court. By this settlement, which recited that the parties had agreed to make a settlement before marriage, the husband and wife covenanted, the latter so as to bind her separate estate with the trustees of the settlement, that all real and personal property not thereinbefore settled to which Mrs. O'Connor was at the time of her marriage entitled, or to which she or Mr. O'Connor in her right at any time during the coverture should be or become entitled, should be settled upon the trusts therein declared for the benefit of Mr. and Mrs. O'Connor and their issue; and the husband assigned to the trustees a policy of assurance on his life to be held upon the trusts of the settlement, and covenanted to keep up the premiums.

In August, 1878, J. W. Knight died, having by his will appointed Selina Knight his sole executrix, and she accordingly became the legal personal representative of Henry Armel Green.

On October 25, 1883, Mr. and Mrs. O'Connor, without disclosing the existence of their marriage settlement, assigned the share of Mrs. O'Connor under the will of Henry Armel Green to the Mutual Life Assurance Society by way of mortgage to secure 400*l.* and interest.

On November 5, 1883, the society obtained in the suit of *Stephens* v. *Green* a stop order on the share of Mrs. O'Connor in the fund in court.

On December 14, 1883, the trustees of the settlement of June 22, 1878, obtained a similar order in the same suit.

On January 16, 1884, the trustees of the settlement gave notice thereof to Selina Knight, who at that date had no notice

of any other incumbrance on Mrs. O'Connor's interest under her father's will.

In 1894 the interest of Henry Armel Green in the fund in court having become vested in possession through the death of his surviving sister without leaving issue, the trustees of the settlement presented this petition for payment of the fund to them. The petition was opposed by the Mutual Life Assurance Society. The petition came on for hearing before Stirling J., on November 17, 1894.

Grosvenor Woods, Q.C., and *A. Cordery*, for the petitioners. We are assignees of Mrs. O'Connor's share under the will of Henry Armel Green, and, having given notice to his legal personal representative, we are entitled to the fund in priority to the society: *Holt* v. *Dewell.* (1) The society is not put in any better position by the stop order which they have obtained. That order can have no operation, because it was not obtained by a person having any interest in the action in which it was obtained.

Order XLVI., r. 12, of the Rules of the Supreme Court, 1883, does not define the persons entitled to obtain stop orders upon funds in Court: it only relates to costs occasioned by stop orders.

The fund is under the control of the Court in the suit of *Stephens* v. *Green* for the purposes of that suit only, and not for the purpose of notice by persons claiming under a beneficiary of the original testator.

A. R. Kirby, for the Mutual Life Assurance Society. The object of notice is to prevent fraud. Obtaining a stop order on a fund in court is equivalent to giving notice to the person having control of the fund. It was not necessary for us to give notice to the legal personal representative of H. A. Green, the fund not being in her hands: *Mutual Life Assurance Society* v. *Langley.* (2)

[STIRLING J. Is there any limit as to who can obtain a stop order?]

None, provided there is an assignable interest. Wherever notice is necessary to complete an assignment, such notice must

(1) 4 Hare, 446. (2) 32 Ch. D. 460.

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be given to the person having control of the fund, or, if the fund be in court, then a stop order must be obtained: *Ward* v. *Duncombe*. (1)

[*Grosvenor Woods, Q.C.* The old rule is that any one entitled to a lien or charge may obtain a stop order: Daniell's Chancery Practice, 6th ed. p. 1633.]

[STIRLING J. referred to *Addison* v. *Cox*. (2)]

We are entitled to priority on the ground that by obtaining the stop order on the fund we gave the only proper and effectual notice to complete our security.

Method, and *J. Rolt*, for other respondents.

Grosvenor Woods, Q.C., in reply. The observations in *Mutual Life Assurance Society* v. *Langley* (3) must be taken in relation to the actual point before the Court.

[STIRLING J. referred to *Bridge* v. *Beadon*. (4)]

That case cannot stand, having regard to *Holt* v. *Dewell* (5) and the cases referred to in 2 Davidson's Conv., 3rd ed. p. 782.

STIRLING J. (after stating the facts). The doctrine that an assignee of an equitable interest in personal estate without notice of a prior assignment or incumbrance may gain priority by giving a proper notice before notice is given by the prior assignee or incumbrancer is well established; but the recent case of *Ward* v. *Duncombe* (1) shews how difficult it is to determine the principles on which the rule is based. It seems desirable, therefore, to begin by inquiring what has already been decided with reference to cases resembling the present. On behalf of the trustees of the settlement, reliance is placed on the case of *Holt* v. *Dewell* (5), where a testatrix entitled upon the decease of a tenant for life to a sum of Consols standing in the names of Thomas Dewell and John Long as trustees specifically bequeathed such stock to Philip Daniel, and appointed Thomas Dewell (one of the trustees of the fund) sole executor of her will. In 1834, after the death of the testatrix, Philip Daniel assigned all his estates and effects to John Long (the other

(1) [1893] A. C. 369.
(2) L. R. 8 Ch. 76.
(3) 32 Ch. D. 460.
(4) L. R. 3 Eq. 664.
(5) 4 Hare, 446.

trustee of the fund) and one R. Higgins upon trust for his creditors. In 1838 Philip Daniel assigned his interest in the stock to the plaintiff Holt by way of mortgage; and the plaintiff thereupon gave Thomas Dewell notice of the incumbrance. No notice of the assignment of 1834 was given to Thomas Dewell until 1843. It was held that until Thomas Dewell, the executor, had assented to the legacy to Philip Daniel, the notice to John Long of the deed of 1834 was insufficient to exclude a subsequent incumbrancer from obtaining priority, and that the notice of the incumbrance of 1838 given to Thomas Dewell by the plaintiff entitled the plaintiff to the prior charge on the fund. The Vice-Chancellor said (1): "In the absence of any assent by the executor to this specific legacy, notice to one of the trustees, in whose name the stock happened to be invested, not being the executor of the testatrix, is not sufficient to vest in the parties, claiming by assignment from the legatee, that equitable possession of the fund which is required in order to postpone a subsequent incumbrancer, who had taken the precaution of giving such notice to the executor."

In *Bridge* v. *Beadon* (2) certain personal estate was vested in the trustees of a settlement upon trust for the separate use of Mrs. Rowcliffe for life, and after her death, in the events which happened, upon trust for such person or persons as she should notwithstanding coverture by deed or will appoint. Mrs. Rowcliffe by deed appointed to her husband for his life 150*l.* a year out of the income of the trust property; and by her will she appointed, among other legacies, 600*l.* to her nephew F. G. Shattock, and 1500*l.* to her nephew J. S. Shattock, and she appointed S. F. Bridge and J. Yates trustees for her nephews as to the legacies thereinbefore given to them respectively, and authorized them to receive and give receipts for such legacies and to invest the same in their names, and to apply the interest towards the maintenance and education of her nephews. In 1830, after the death of Mrs. Rowcliffe, F. G. Shattock mortgaged his legacy to Messrs. Sanders, who gave notice of their mortgage to Bridge and Yates, but not to the trustee of the settlement. In 1839 F. G. Shattock mortgaged his legacy to

(1) 4 Hare, 451. (2) L. R. 3 Eq. 664.

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S. C. Whitbread & R. Martineau, who gave notice of this mortgage both to Bridge and to the trustee of the settlement. The question arose whether Messrs. Sanders or Messrs. Whitbread & Martineau were entitled to priority. Lord Romilly M.R. said (1): "By the will of Mrs. Rowcliffe the legacies of 600*l.* and 1500*l.* were appointed to her nephews, and Bridge and Yates were appointed trustees of the legacies, to receive them and apply the interest for the maintenance and education of the legatees. I am of opinion that the trusts reposed in Bridge and Yates were intended to be confined to the period of the infancy of the respective legatees, and that each legatee, upon attaining twenty-one, would be entitled to receive his legacy directly from the trustees of the settlement." These observations are sufficient to justify the actual decision in that case, which was that Messrs. Whitbread & Martineau were entitled to priority; but his Lordship continued: "But even if the testatrix had appointed the legacies to the trustees in trust for her nephews, I am of opinion that so long as the trusts of the settlement had not been fully executed, and the trust funds remained under the control of the trustee of the settlement, that trustee was the person to whom an assignee of the legacies was bound to give notice. If, at the death of William Rowcliffe, these legacies had been paid over to the trustees under the will, notice to the trustee of the settlement would from that time have ceased to be necessary, but until the funds left his hands he continued to be the trustee for the purposes of notice."

An able critic has already pointed out (2 Dav. Conv. 3rd ed. p. 782) that it is not easy to reconcile these observations with the judgment of Wigram V.-C., or his decision, in the case of *Holt* v. *Dewell* (2), which was not cited in *Bridge* v. *Beadon*. (3) These two cases, so far as I can discover, are the only decisions which bear directly on the question which I have to decide. It seems to me that the Vice-Chancellor's judgment contains the better view of the law. An executor who has not assented to a legacy remains in complete control of his testator's personal estate, including such portion of it as may consist of reversionary

(1) L. R. 3 Eq. 667. (2) 4 Hare, 446.
(3) L. R. 3 Eq. 664.

interests. For the purpose of duly discharging the duties of his executorship he may either sell and dispose of a reversionary interest, or may wait until the interest falls into possession and then get it in. If he adopts the former course, then he is answerable to the persons claiming under the testator's will for the proceeds of sale, and not for the fund in which the interest existed. If, on the other hand, he adopts the latter course, he alone is entitled to receive, and give an effectual discharge for, the fund in which the interest has fallen into possession; and no person claiming under the will of the testator could be allowed to stand in the way of its being received by him, so long, at all events, as he is acting in due discharge of his duty as executor.

In the present case there is no suggestion that the legal personal representative of Henry Armel Green has in any way assented to the residuary bequest contained in the will of his testator.

According to the authorities, the persons to whom notice ought to be given for the purpose of gaining priority are those who have the control and custody of the fund (see *Mutual Life Assurance Society* v. *Langley* (1)), or, in the language of Lord Macnaghten in *Ward* v. *Duncombe* (2), those who have "legal dominion over the fund." In the present case the fund was in court in the suit of *Stephens* v. *Green*, and the Court had the custody and control of the fund for all the purposes of that suit, but, in my opinion, not for any other purposes. If the legal personal representative of Henry Armel Green had seen fit, on the death of his sister without leaving issue, to present a petition asking for payment of the fund to himself on the ground that it was required for the discharge of his duties as executor (namely, payment of probate duty and the unsatisfied legacies given by the will of Henry Armel Green), I apprehend the Court would have been bound either to accede to the application, leaving the parties claiming the residuary estate of Henry Armel Green to work out their rights in the suit of *Green* v. *Knight*, or, at all events, to direct the fund to be carried over to the general credit of the last-mentioned cause. It would not be in accordance with

(1) 32 Ch. D. 460. (2) [1893] A. C. 384.

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the practice of the Court in an action for the administration of the estate of one testator to administer another; for example, to make an order in a suit for the administration of the estate of Henry Green which involved the administration of the estate of his son Henry Armel Green, who was simply a beneficiary under his will.

It appears to me that under these circumstances, and for the purposes of notice as regards the interests of persons claiming under Henry Armel Green, the fund was not really under the control of the Court in *Stephens* v. *Green.*

It was said, however, that the stop order obtained by the Mutual Life Assurance Society would have prevented the legal personal representative of Henry Armel Green from obtaining possession of the fund without at the same time being affected with notice of the incumbrance in favour of the society. No attempt, however, was made by the legal personal representative to obtain possession of the fund before December 14, 1883, at which date the trustees of the settlement had also obtained a stop order; and from that time forward, if the legal personal representative had attempted to obtain possession of the fund she would have been affected at one and the same time with notice of both stop orders. Further, on January 16, 1884, the legal personal representative, being up to that time unaware of any incumbrance affecting the fund, received notice of the existence of the settlement. No such notice has been given by the society, and since January 16, 1884, nothing has happened which can affect the priorities. Under these circumstances, I think the stop order obtained by the society was insufficient to deprive the trustees of the settlement of the priority to which their settlement is entitled by virtue of its earlier date, and that their title prevails over the incumbrance in favour of the society.

G. A. S.

C. A.

The Mutual Life Assurance Society appealed. The appeal came on for hearing on April 25, 1895.

Farwell, Q.C., and *A. R. Kirby*, for the appellants. Where there is a settlement and a sub-settlement by beneficiaries under an original settlement, notice should be given to the trustees of

the original settlement: *In re Booth's Settlement Trusts* (1); *Bridge* v. *Beadon* (2); Lewin on Trusts, 9th ed. p. 800. *Holt* v. *Dewell* (3) is inconsistent with these authorities and cannot be upheld. The question is discussed in Davidson's Conveyancing, 4th ed. vol. ii. pt. 2, pp. 228–230. The persons having the legal dominion over the fund are the persons to whom notice ought to be given; and where the Court has dominion over the fund, as in this case, the proper mode of giving effective notice is to obtain a stop order: *Mutual Life Assurance Society* v. *Langley* (4); *Ward* v. *Duncombe.* (5)

[LOPES L.J. referred to *Pinnock* v. *Bailey.* (6)]

The respondents claim under a voluntary settlement, and the Court will therefore not enforce the covenant to settle after-acquired property, and the character of the settlement is not affected by the recital that the parties had agreed to make a settlement before marriage. [Upon this point they cited *Buckmaster* v. *Buckmaster* (7); *Martin* v. *Martin* (8); *Warden* v. *Jones* (9); *Trowell* v. *Shenton* (10); Sugden on Powers, 8th ed. p. 649; *Green* v. *Paterson.* (11)]

Grosvenor Woods, Q.C., and *A. Cordery*, for the trustees of the settlement. 1. The person to whom notice should be given is the person whose duty it was to pay over the money to the assignor, i.e., the personal representative of H. A. Green: *Holt* v. *Dewell.* (3) *In re Booth's Settlement Trusts* (1) is wrongly decided; it is not generally inserted in the text-books.

[LINDLEY L.J. It is referred to in Fisher on Mortgages.]

Apart from the authorities, the judgment of Stirling J. is right on principle. [They also cited *Board of Works* v. *Harby.* (12)]

2. The settlement contains mutual covenants by the husband and the wife, and it was made by the husband in order to avoid proceedings for committal. There was, therefore, ample consideration for the covenant to settle the wife's property, and the

(1) 1 W. R. 444; 21 L. T. (O.S.) 239.
(2) L. R. 3 Eq. 664.
(3) 4 Hare, 446.
(4) 32 Ch. D. 460, 469.
(5) [1893] A. C. 369.
(6) 23 Ch. D. 497.
(7) 35 Ch. D. 21.
(8) 2 Russ. & My. 507.
(9) 2 De G. & J. 76.
(10) 8 Ch. D. 318.
(11) 32 Ch. D. 95.
(12) 5 W. R. 400.

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Court will enforce it. [Upon this point they cited *Watts* v. *Watts* (1); *Montefiore* v. *Behrens* (2); *Mackintosh* v. *Pogose*. (3)]

Farwell, Q.C., in reply.

LINDLEY L.J. (after stating the facts). Stirling J. has decided that the trustees of the settlement are entitled to priority over the mortgagees, partly because the settlement was prior in point of date to the mortgage, but more especially because the trustees of the settlement gave notice of their settlement to the son's legal personal representative, whereas the mortgagees gave no notice at all, except by the stop order. Now, the question is whether that decision is correct.

The authorities upon the point are not altogether in harmony, and I will consider the matter before I turn to the authorities with reference to the principle which underlies all of them, as far as I understand it. The principle is to be found by turning to the leading case of *Loveridge* v. *Cooper*. (4) That case settled, for the first time, that if there are several assignments of interest in personal estate the assignee who gives notice first to the trustee is entitled to priority. That was a comparatively simple case. There was one estate, and it was the duty of the trustee to distribute the estate among the cestuis que trust; and the principle of the decision was that an assignee of the beneficial interest by giving notice to the trustee converted the trustee into a trustee for him.

Let us see whether that principle does not shew that Stirling J. was right here. Who was the trustee for Mrs. O'Connor? Who was the person whose duty it was to pay her her share of her grandfather's estate? I should say unquestionably the answer to that question is that it was her father's legal personal representative. She had no interest in this estate except subject to the payment of the debts and funeral and testamentary expenses of her own father; and she had no right at all against the trustee of her grandfather. He was not her trustee in any proper sense of the expression; the father's legal personal representative was a trustee of the son's share for the son's legal personal represen-

(1) 24 W. R. 489.
(2) L. R. 1 Eq. 171.
(3) [1895] 1 Ch. 505.
(4) 3 Russ. 1.

tative. If that be so, in order that the person claiming under the son's will should convert anybody into a trustee for him by notice, the notice must be to the son's legal personal representative, whose duty it was first to get in the assets and then to distribute them amongst the beneficiaries claiming under the son's will.

I pass on to another point which bears upon the same question. In practice, when cestuis que trust are going to sell an interest or to borrow money on their shares, in what quarter do business men make inquiries in order to ascertain whether those shares have been previously incumbered? They do not go back, nobody knows how far, to make inquiries of the trustees of the original settlement; they go to the immediate trustee for the cestui que trust—the person whose business it is to hand over the money to the cestui que trust with whom they are dealing. It appears to me, then, that the principle laid down in *Loveridge* v. *Cooper* (1) with regard to notice and priority would apply to the legal personal representative of the son; and, inasmuch as the trustees of the settlement gave notice to her before the mortgagees gave notice to her, the trustees of the settlement would have priority.

But, then, it is said there are authorities such as the *Mutual Life Assurance Society* v. *Langley* (2) and *Ward* v. *Duncombe* (3), in the House of Lords, to the effect that notice should be given to the holder of the fund. Well, so it ought, if the holder of the fund is converted by the notice into a trustee for the assignee; and when one looks into the case of the *Mutual Life Assurance Society* v. *Langley* (2), the explanation is obvious. There was a fund of which a person was trustee, and that fund had come into Court. The question was, whether the assignee ought to give notice to the trustee or ought to get a stop order, and the Court said, "You ought to get a stop order; you ought to give notice to the person whose duty it is to distribute the fund to you." That appears to me to be perfectly consistent with the observation which I am now making. As to the other authorities, *Holt* v. *Dewell* (4) is quite in accordance

(1) 3 Russ. 1.
(2) 32 Ch. D. 460.
(3) [1893] A. C. 369.
(4) 4 Hare, 446.

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with the view I am expressing; but, on the other hand, the case of *In re Booth's Settlement Trusts* (1), which was decided in 1853 by Page Wood V.-C., is an authority in favour of the appellants. There, there were two settlements, a primary settlement and a secondary settlement, and the Vice-Chancellor held that notice ought to have been given to the trustees of the original settlement. Unfortunately it does not appear that the case of *Holt* v. *Dewell* (2) was brought to his attention; and I confess that I do not myself see any difference in principle to distinguish *Holt* v. *Dewell* (2) and *In re Booth's Settlement Trusts.* (1) There is a difference in details exactly as there is here. In *Holt* v. *Dewell* (2) there was a trustee of the secondary interest whose duty it was to get in the estate for administration; but I do not think that is of any real importance. Then, again, reliance was placed by counsel for the appellants on the case of *Bridge* v. *Beadon* (3), to which I will refer. I have not the slightest doubt upon looking at it that that decision was perfectly correct. It was a case in which there was a settlement, and there were trustees of that settlement; and then there was a will made by a cestui que trust under that settlement appointing trustees for children, and the trust under the will ceased when those children attained twenty-one. Therefore, when they attained twenty-one their trustees were really not the trustees of the will, but were the trustees of the original settlement, as Lord Romilly points out in the following passage. He says: "I am of opinion that the trusts reposed in Bridge and Yates were intended to be confined to the period of the infancy of the respective legatees, and that each legatee, upon attaining twenty-one, would be entitled to receive his legacy directly from the trustees of the settlement." Of course, if that is so, notice to the trustees of that settlement is quite right, and that would give priority. Then he goes on to use this language in a passage which, I must say, I think is unfortunate: "But even if the testatrix had appointed the legacies to the trustees in trust for her nephews, I am of opinion that so long as the trusts of the settlement had not been fully executed, and the trust funds remained under the control of the

(1) 1 W. R. 444; 21 L. T. (O.S.) 239. (2) 4 Hare, 446.
(3) L. R. 3 Eq. 664, 667.

trustee of the settlement, that trustee was the person to whom an assignee of the legacies was bound to give notice. If, at the death of William Rowcliffe, these legacies had been paid over to the trustees under the will, notice to the trustee of the settlement would from that time have ceased to be necessary, but until the funds left his hands he continued to be the trustee for the purposes of notice."

That has got into Mr. Lewin's book, which is an extremely valuable work. At p. 800 there is the following passage: "Where there are two settlements, one original and the other derivative, the notice should be given to the trustees of the original settlement who hold the property." I think that that principle is not sound, and it would have for its consequence the imposition of duties upon trustees of an extremely onerous nature. Suppose I am a trustee of a settlement, am I to take note of all the dealings of everybody who may have an interest in the fund of which I am trustee? It would make my position perfectly intolerable. It is quite enough to carry out the trusts of my own settlement. But to have to attend to claims made by the incumbrancers of cestuis que trust under subsequent settlements, however remote, would entail consequences which would be quite unreasonable. The rule as stated in Mr. Lewin's book is wrong in principle. The true principle is that which I have stated.

What, then, is the effect of the stop order which the mortgagees obtained? The effect of that stop order was not to convert the trustees of the father's will into trustees for the person getting the stop order. It had no effect of the kind. But it had an effect, and a useful effect, because it prevented the legal personal representative of the son who was entitled to the fund from getting it without giving notice to the person who got the stop order. That is a very valuable protection. It is true that when the legal personal representative went to obtain the money he would have notice of that stop order, and if he had had no prior notice from the trustees of the settlement, the notice so acquired by that stop order would be sufficient to protect the appellants. However, unfortunately, the legal personal representative of the son had notice of this settlement. It appears to me, therefore, that the decision of Stirling J.

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is correct. When we have to choose, as choose we must, between the conflicting authorities, in my opinion the case of *Holt* v. *Dewell* (1) is sounder than *In re Booth's Settlement Trusts* (2) and the dictum in *Bridge* v. *Beadon*. (3)

Then the other point is this. It is said that the settlement is void as against the appellants, because the trusts are such as the Court would not enforce. I cannot agree with that. Mrs. O'Connor was a ward of Court, and was married without the consent of the Court. Her husband afterwards made a settlement with her. That settlement contains covenants by both the husband and the wife, and it settles a policy of assurance. It appears to me impossible to say that that is a settlement which the Court would not take into consideration and enforce. The consideration required is to be found in the covenants on the part of the husband. In dealing with contracts made without consideration what we have to consider is this. Under ordinary circumstances, the Court of Equity of course will not decree specific performance of a contract which is not made for some consideration. That is common knowledge; but at the same time it would take a good deal to make me refrain from enforcing a contract entered into by a ward of Court in order to keep her husband out of gaol. I do not doubt for a moment that the Court would enforce a covenant of that kind in a settlement so executed; but the real answer, I think, to the contention put forward on behalf of the appellants is, that there is ample consideration here.

I think, therefore, that the appeal should be dismissed.

LOPES L.J. This matter of priority of notice is a matter with which I am not familiar; but I have had the opportunity of considering the cases, and the arguments which have been addressed to the Court, and I agree with the judgment which Lindley L.J. has delivered. I will only shortly state the ground for the conclusion at which I have arrived. It is this, that the only proper person to whom to give notice is the person who is the trustee for the assignor, and that the effect of such notice is

(1) 4 Hare, 446. (2) 1 W. R. 444; 21 L. T. (O.S.) 239.
(3) L. R. 3 Eq. 664.

to convert him into a trustee for the assignee. If that is so, in the present case we have here the personal representative of the second testator, namely, the son, who was a trustee of the assignor. Therefore, according to the view which has been already stated, and according to my view, he is the proper person to whom the necessary notice should have been given. Under these circumstances the trustees of the settlement would be entitled to priority.

With regard to the other point, it was contended that this was a voluntary settlement, and for some time I had a doubt about that matter. But when the circumstances of this settlement were looked into it became quite clear that there was ample consideration. There were mutual covenants, and there was also the provision with regard to the policy of assurance to be effected by the husband. I cannot doubt for a moment that specific performance would have been granted by the Court of Equity of these covenants. Under those circumstances, I am of opinion that the decision of the learned judge was right.

KAY L.J. The stop order obtained in this case was on the fund which was in Court in the administration of the father's estate, and it had no greater effect for the purpose of the question we have to consider here than notice given to the executor of that will would have had if the fund, instead of being in Court, had been in his hands. That was admitted in argument, and it cannot be doubted that that is the true effect of the stop order.

Well, then, the question is whether a prior notice of a subsequent incumbrance given to the executors of the father would entitle that subsequent incumbrancer to priority over the incumbrancer who was prior in date, and who gave the first notice to the executor of the son. In truth, it comes to this. Suppose there had been a settlement, and then a second derivative settlement of the interest of the cestui que trust, the son, under the first settlement, and then the cestui que trust under the second settlement had improperly made an assignment of the property comprised in that second settlement. If the doctrine here contended for be right, if there had been two assignments made,

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first one to A. and then another improperly to B., and A. gave notice to the trustee of the second settlement, B., if he had no notice of the first assignment, might obtain priority over him by giving notice to the trustee of the first settlement. I was certainly very much startled to hear that there was any decision which could produce that result. The principle to be followed which was distinctly stated by the Lord Chancellor, Lord Eldon, in the case of *Loveridge* v. *Cooper* (1), is this: "The act of giving the trustee notice, is, in a certain degree, taking possession of the fund: it is going as far towards equitable possession as it is possible to go; for, after notice given, the trustee of the fund becomes a trustee for the assignee who has given him notice."

Now, applying that principle to this case, how is it possible to say here that the executor of the father, if notice had been given to him of the mortgage by the Mutual Society, could have become a trustee for the society? The executor of the father would say, "I have nothing to do with any settlement executed by the son; I must carry out my trust; and no notice that you can give me can possibly interfere with my right to do that"; and no stop order would have had any other effect. The effect of obtaining a stop order would have been no greater than the giving of such a notice. I am clear, according to principle, that the person to whom any notice ought to have been given in this case by the Mutual Society was the executor of the son, who was the immediate trustee for the assignor of the debt, and that they need not go further in order to find out in whose hands the fund was. Upon any other view of the law I can see no escape from this result, that if a settlement included a debt due from a third party which is a common case—if it included a bond, for instance, given by the father of the wife to the trustee—the person to whom notice should be given would be the obligor under that bond, and not the trustee. It is, I think, impossible to say that; and therefore I agree with what has already been said by the Lord Justice, that the case of *In re Booth's Settlement Trusts* (2) is not an authority which we ought to follow or recognise as binding upon this Court; and if that case decided, as it seems to have decided, that the notice given to the trustee of the original

(1) 3 Russ. 58. (2) 1 W. R. 444; 21 L. T. (O.S.) 239.

settlement was a notice which gave priority to a subsequent assignee, I, speaking for myself, am not prepared to follow it. So much for the first point.

Upon the second point it was argued that this was a voluntary settlement, and that inasmuch as this property was only included in it by reason of there being a covenant to settle after-acquired property, the Court of Equity would not decree specific performance of it; that consequently it did not bind this property in any way; and that therefore the Mutual Society would have a better claim than the trustees of the settlement. But when we look at this settlement we find that, although it was post-nuptial, it contained not merely a settlement of the property of the wife which then existed, but also a settlement of a policy of assurance effected by the husband on his own life which was assigned to trustees, and which the husband covenanted to keep up; so that between the husband and wife, as in many of the decided cases, there was quite sufficient consideration, although the settlement was not made before the marriage, but was post-nuptial.

I agree with Lindley L.J., that this was a settlement made in order to prevent an application being made to the Court for the committal of the husband for contempt for marrying a ward of Court. In such a case the Court would have acted without the leave of the husband. I cannot conceive, if such a settlement had been made under the order of the Court, that the Court of Chancery would have had any difficulty in supporting it, and in decreeing specific performance of its covenants.

Therefore, I think, on both points the appeal from the order of Stirling J. fails, and that the settlement ought to be upheld as having priority over the mortgage. The appeal must be dismissed with costs.

Solicitors: *Woodrooffe & Burgess; Burchell & Co.; Meredith, Roberts & Mills.*

H. C. J.

C. A.
1895
April 24, 25, 30.

In re LONDON AND GENERAL BANK.

Company—Winding-up—Misfeasance of Officers—Auditors—Banking Company—Companies Act, 1879 (42 & 43 *Vict. c.* 76), *s.* 7—*Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 10.

Auditors who have been appointed by a banking company in pursuance of the Companies Act, 1879, s. 7, and are spoken of as officers of the company in the articles of association, are officers within the meaning of the 10th section of the Companies (Winding-up) Act, 1890, and if guilty of misfeasance may be made liable in proceedings under that section.

In this case there were four appeals from a judgment of Vaughan Williams J. made in the winding-up of the London and General Bank, Limited, by which he declared certain directors and auditors of the company liable for the payment of dividends out of capital.

The company was a banking company registered as a limited company after the passing of the Companies Act, 1879, the 7th section of which renders necessary the auditing of the accounts of any banking company registered after that date by auditors appointed annually by the company. (1)

The articles of association of the company were drawn in conformity with the Act. By the interpretation clause, art. 2, "auditors" and "secretary" were defined to mean "those respective officers from time to time of the company."

Art. 73 provided that any director, auditor, manager, secretary, or other officer should be indemnified by the company from all

(1) 42 & 43 Vict. c. 76, s. 7: "(1.) Once at the least in every year the accounts of every banking company registered after the passing of this Act as a limited company shall be examined by an auditor or auditors, who shall be elected annually by the company in general meeting.

"(2.) A director or officer of the company shall not be capable of being elected auditor of such company.

* * * *

"(7.) The remuneration of the auditor or auditors shall be fixed by the general meeting appointing such auditor or auditors, and shall be paid by the company."

Sect. 8: "Every balance-sheet submitted to the annual or other meeting of the members of every banking company registered after the passing of this Act as a limited company shall be signed by the auditor or auditors, and by the secretary or manager (if any) and by the directors of the company, or three of such directors at the least."

losses and expenses incurred by them in the discharge of their respective duties, except such as happened through their own wilful default or neglect. Art. 107 provided that the accounts should be from time to time examined and their correctness ascertained by two or more auditors; art. 108, that no person should be eligible as an auditor who was not a shareholder of the company, or who was interested otherwise than as a shareholder in any transactions of the company; art. 109, that two auditors should be appointed at the ordinary general meeting of the shareholders for a year; art. 112, that the remuneration of the auditors should be determined by the ordinary meeting; and art. 121, that any director, manager, auditor, trustee, member of committee, officer, servant, agent, accountant, or other person employed in the business of the company, should before entering on his duties sign a declaration pledging himself to observe strict secrecy respecting all the transactions of the company.

The company was formed for the purpose of making loans and otherwise assisting a number of building companies called the "Balfour" group of companies, and its profits consisted mainly of interest and commission payable by them. The interest and charges were generally debited to the current accounts of the borrowing companies, and the accounts of those companies were in most cases kept in credit by fresh loans from, and the interest and charges paid out of, money lent directly or indirectly by the banking company. The balance-sheet sanctioned by the auditors and presented to the shareholders by the directors had been so drawn for some years that they did not shew the true position of the bank, and dividends were declared and paid out of capital, and not out of profits.

A petition was presented for winding up the company, and an order for winding up was made; and the official liquidator took out a summons under the Companies (Winding-up) Act, 1890, s. 10, against Messrs. Walker, Layton, and Pattison, directors of the company, and Messrs. Theobald and Timms, the auditors, asking that they might be declared liable to make good the sums paid as half-yearly dividends during certain years, on the ground that they had been paid out of capital and not out of income.

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Vaughan Williams J., by whom the summons was heard, declared that the dividends complained of were improperly declared and paid, and that the directors were liable to make them good; and that the auditors were also liable for some of those dividends on the ground that they had sanctioned balance-sheets which were erroneous and delusive.

From this decision the three directors and Mr. Theobald, one of the auditors, appealed.

The evidence was extremely voluminous; but before the Court could complete the hearing of the case, it was necessary to decide the preliminary point as to the jurisdiction of the Court to determine the question of the liability of the auditors on this summons. The case is therefore now reported on that point only, the arguments on the merits being deferred till the hearing of the appeals is concluded.

Sir E. Clarke, Q.C., *H. Reed, Q.C.*, *Low*, *Germaine*, and *Ward Coldridge*, for the various directors.

Cohen, Q.C., *Cozens-Hardy, Q.C.*, and *F. Whinney*, for the auditor Theobald. The present proceedings are taken under the 10th section of the Companies (Winding-up) Act, 1890, which gives summary powers to the Court to assess damages in the winding-up of a company against delinquent promoters, directors, managers, liquidators, or other officers of the company. (1) The auditor is not an officer of the company, and cannot be brought

(1) 53 & 54 Vict. c. 63, s. 10: "(1.) Where in the course of the winding up of a company under the Companies Acts it appears that any person who has taken part in the formation or promotion of the company, or any past or present director, manager, liquidator, or other officer of the company, has misapplied or retained or become liable or accountable for any moneys or property of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the Court may, on the application of the official receiver, or of the liquidator of the company, or of any creditor or contributory of the company, examine into the conduct of such promoter, director, manager, liquidator, or other officer of the company, and compel him to repay any moneys or restore any property so misapplied or retained, or for which he has become liable or accountable, together with interest after such rate as the Court thinks just, or to contribute such sums of money to the assets of the company by way of compensation in respect of such misapplication, retainer, misfeasance, or breach of trust as the Court thinks just."

under the description of any of the persons who are subject to this summary jurisdiction. If he has been guilty of any misfeasance an action may be brought against him which would be tried by a jury; but the present order was beyond the jurisdiction of the Court. He is appointed as an independent person, and is in no fiduciary relation either to the directors or to shareholders. Sect. 7 of the Companies Act, 1879, in sub-s. 2, says that no director or officer of the company shall be capable of being appointed auditor, thus making a distinction between the two characters: *Coventry and Dixon's Case.* (1) In *Carter's Case* (2) a solicitor was held not to be an officer under s. 165 of the Companies Act, 1862: *In re Great Wheal Polgooth* (3) is to the same effect. The same has been held of a banker in *In re Imperial Land Co. of Marseilles.* (4) The section of the Act of 1890 is evidently intended to apply only to persons who have some control over the assets and have misapplied them.

Finlay, Q.C., E. S. Ford, and *Muir Mackenzie,* for the official liquidator. An auditor is no doubt independent of the directors, but he is no less an officer of the company. He is especially appointed for the protection of the shareholders; and if he fails in his duty he is certainly liable to an action for misfeasance: *Leeds Estate Building and Investment Co.* v. *Shepherd.* (5) He is exactly in the position of a person who was intended to be reached by the 10th section of the Companies (Winding-up) Act, 1890. He is treated as an officer by the Companies Act, 1879, s. 7, and also by the articles of this company, such as arts. 73, 107, 108, 109, 112 and 121. In the recent case of *In re Liberator Permanent Benefit Building Society* (6), the solicitor of the company was held to be an officer, and liable for misfeasance under the 10th section.

Cohen, Q.C., in reply.

Cur. adv. vult.

April 30. Lindley L.J. The question which has been submitted to us in this case is, whether an auditor of this bank

(1) 14 Ch. D. 660.
(2) 31 Ch. D. 496.
(3) 49 L. T. (N.S.) 20.
(4) L. R. 10 Eq. 298.
(5) 36 Ch. D. 787.
(6) 71 L. T. (N.S.) 406.

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can be properly regarded as an officer within the meaning of s. 10 of the Companies (Winding-up) Act of 1890. [His Lordship read the section, and continued:—]

It is urged by Mr. Cohen that the auditor of a company is not an officer within the meaning of that section. It appears to me that in order to decide that question we must consider what an auditor is, how he is appointed, by whom he is paid, and what his duties are. This is a banking company, and the auditor is required to be appointed under the Companies Act of 1879, which is one of the group of Companies Acts from 1862 down to 1890. Now s. 7 of this Act of 1879 is as follows: [His Lordship read the section.] And sect. 8 says this balance-sheet shall be signed by the auditors and by the secretary and three of the directors. Now, reading that 7th section alone, it seems to me impossible to deny that for some purposes and to some extent an auditor is an officer of the company. He is appointed by the company, he is paid by the company, and his position is described in the section as that of an officer of the company, although he is not a servant of the directors, but on the contrary is appointed by the company to check the directors.

Then if we pass to the articles of this particular company we find that the definition clause, art. 2, says that "'auditors and secretary' means those respective officers from time to time of the company." And there are several other articles relating to the appointment and duties of the auditors which seem important. [His Lordship then referred to arts. 73, 107, 108, 109, 112, and 121, and continued:—] I do not think there is anything else in those articles which is material, and I do not know that those articles carry the matter very much further than the section of the Act to which I have alluded; but they confirm the observations which I have already made, namely, that for some purposes and to some extent, at all events, an auditor is an officer appointed by the company, although in no sense a servant of the directors.

But it is said that for all that he is not an officer of the company within the meaning of s. 10 of the Act of 1890. And it is put in this way—that an officer within the meaning of s. 10 is an officer who in some way or other has control over the assets of

the company. Now, it is quite obvious that this section applies to something more than the misapplication of assets. Misapplication or retainer or becoming liable or accountable for the assets is provided for by the first part of the section which I have read; but in addition to that there is mention made of misfeasance or breach of trust in relation to the company, and to remedy these, provision is made, not by the words which authorize the Court to compel the person guilty of misfeasance or breach of trust to repay any moneys or restore any property, but by a direction that they shall contribute such sums of money to the assets of the company by way of compensation in respect of such misapplication, retainer, misfeasance, or breach of trust as the Court thinks just.

I know nothing about the charges against this auditor, as the facts have not been gone into before us, but suppose that an auditor whose business it is to audit accounts and sign balance-sheets knows perfectly well that the balance-sheet so signed by him will be acted upon, and that if it shews profits properly divisible as dividend a dividend will be declared, and suppose that he purposely and fraudulently prepares and signs a balance-sheet shewing profits divisible when there are none—it appears to me that that is a distinct misfeasance within the meaning of the Act, leading to, and intended to lead, to a misapplication of the assets. Such a misfeasance, I have not the slightest doubt, would be a misfeasance within the meaning of the section. Although that does not shew that he is an officer of the company, yet, having regard to the articles of association of this company and the provisions in the Act which I have referred to, I do not see how it can be said that as a matter of law this gentleman is not an officer of the company and cannot be liable for misfeasance. In my opinion he is an officer, and his conduct may be within the mischief contemplated by s. 10.

But it is said that is very hard upon persons who are auditors, and that if they are guilty of negligence, fraud, or misconduct the proper remedy is by an action. But suppose an action were brought against an auditor upon the ground that the accounts had been fraudulently audited, how could that be possibly tried by a jury? It would demand and would necessitate a

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prolonged investigation of the accounts, and no one who has any experience of trial by jury would for a moment pretend that it could be so tried, and therefore it must be referred to some other tribunal. Therefore the point made by Mr. Cohen that you are going to deprive him of his constitutional right to trial by jury cannot be sustained, and the objection fails. We cannot say that the auditor of a company in a case like this is not an officer of the company within s. 10.

Lopes L.J. I am of the same opinion. The question is whether an auditor such as the auditor in this case is an officer within the true meaning of s. 10. I do not propose to read the section again which has already been read, but it is to be observed, in respect of this section, that it does not create any new rights, but it gives a very summary mode of procedure in enforcing rights already existing. Now, if it were not for the word "misfeasance" in s. 10, I should not have thought that an auditor such as the auditor in the present case came within the meaning of that section. I should have thought that the section, if that word had been absent, was rather directed against those who had to carry out the business and purposes of the company, who had the control over the assets of the company, who had the conduct of the business, and who might have the money or the property of the company in their hands, which they might apply, retain, or restore. But I find the word "misfeasance," and as I understand the word "misfeasance" in this section it means a breach of duty. Now, if it means a breach of duty, one can quite understand a breach of duty which might be committed by an auditor. For instance, he might, in collusion with his directors, prepare a false account which would involve a misapplication of the assets. In such a case it seems to me that that would be one of the mischiefs which this section was intended to prevent. I come, therefore, to the conclusion that an auditor such as the auditor of a banking company is an officer within the meaning of that section. And I am fortified in that view by the words of the 7th section of the Companies Act of 1879, because it seems to me that that section recognises the auditor of a banking company as an officer. Sub-s. 4 says,

"If any casual vacancy occurs in the office of auditor," and throughout the section seems to contemplate that the auditor is an officer of the company. That fortifies the view that I have formed with regard to s. 10; and I am also confirmed in that view by the fact that the articles of association of this very banking company recognise the auditor as an officer. A case was referred to, *In re Liberator Permanent Benefit Building Society* (1), which came before Cave and Collins JJ. That was not a case of an auditor. That was the case of a solicitor. It was not the case of a banking company, but of a building society. And it is true that Cave J. in the course of his judgment says: "It seems to me that merely because he was appointed solicitor to the society, without more, the solicitor does not become an officer of the society any more than it has been held that a banker does if he is appointed banker to the society, or a broker if he is appointed broker to the society, or the auditor if he is appointed auditor to the society." I do not think that the attention of Cave J. was drawn to the word "misfeasance"; but however that may have been, there is no decision in this case as to an auditor. It may be again said that the section of the Act of 1879 which relates to the auditor of a banking company would not relate in the same way to a solicitor, and for anything I know (I have not been able to find it out) it does not appear that the articles of association, so far as I can see, recognise the solicitor as an officer. I come, therefore, to the conclusion that the auditor of this banking company was an officer within the true meaning of s. 10 of the Companies (Winding-up) Act of 1890.

Kay L.J. I have come to the same conclusion; but I wish to guard myself against being understood to hold that in every case of a joint stock company the auditor employed by the joint stock company is an officer of the company. I do not at present hold that opinion. I can quite conceive that there may be cases of a joint stock company who call in an auditor to make a particular audit where the auditor called in could not be properly treated as an officer of the company; but we have got to deal in this case with a banking company limited,

(1) 71 L. T. (N.S.) 406, 407.

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whose duties in respect of having their accounts audited are prescribed by the Act of 1879, to which reference has been made. And it will be observed on looking at the 7th section of that Act of Parliament that the auditor is to be appointed by the company in general meeting. The 1st sub-section of s. 7 says that, "Once at the least in every year the accounts of every banking company registered after the passing of this Act as a limited company shall be examined by an auditor or auditors, who shall be elected annually by the company in general meeting." So that the election is not like the election of the ordinary officers of the society—delegated to the directors of the company; but it is prescribed by statute that there shall in this case be an auditor elected by the company in general meeting. Then I find, turning to the articles of this society, that they recognise distinctly their duty, and by the interpretation clause of their articles they do define expressly that the auditor of this company shall be an officer of this company. The words have been read, but I will refer to them again for a moment. Art. 2 says: "'Auditors and secretary' means those respective officers from time to time of the company." Then, again, we find in art. 73 a recognition of the fact that auditors duly appointed by the company are officers of the company; and then come the articles which speak of the duties of auditors—arts. 107 and 108; and art. 108 provides that no director or officer of the company shall during his continuance in office be eligible as auditor. It was said that that shews plainly that an auditor is not to be an officer of the company, but somebody who is not an officer. I do not read it in that sense. It is a copy of the language of the Act of 1879, which provides in s. 7, sub-s. 2, that, "A director or officer of the company shall not be capable of being elected an auditor of such company." I take art. 108 not to contradict that which has been said in the earlier part of these articles, that an auditor of this company is an officer of the company, but merely to provide, as the statute provides, that while he is an auditor he shall not hold any other office in the company. The object of that section is that he might not hold some other office the duties of which might bias him in his conduct as an auditor, and therefore, to prevent the danger of that, it is provided by

that statute, and repeated by the articles, that he cannot hold at the same time any other office of the company. That seems to me to reconcile these articles with the statute, and dealing with this particular clause, which is all we have got to consider now, I come to the conclusion that in this case the company in its constitution recognised the necessity of having auditors duly appointed under the statute of 1879, and made these provisions that auditors so appointed should be treated by this company as being officers of the company. In the face of that, it seems to me quite impossible to hold that auditors are not officers of the company. Here the question whether the auditors are officers within s. 10 of the Companies (Winding-up) Act, 1890, seems to be almost concluded when you have arrived at the opinion that they have been appointed officers of the company. For all that the section provides is only a convenient mode of dealing on the one hand with the misapplication of the funds of the company by its officers, and on the other hand for misfeasance other than misapplication of the money of the company, which may lead to an injury and damage to the company; and this is to be met, as the section says, by compensation to the company. The words "misfeasance" and "compensation," as used in that section, seem to me to be clearly correlative, and when that section speaks of the misfeasance of an officer of the company it must mean misfeasance other than the misapplication or misappropriation of the property of the company. And, to remedy that misfeasance, the power which that section gives requires that persons convicted of misfeasance shall make compensation to the company. As has been said by Lindley L.J., the misfeasance by an auditor might produce very considerable damage and injury to the company of which he was auditor; and in that case it seems to me that he certainly comes within the section, and that he can be made liable for such misfeasance, and can be obliged to make compensation to the company.

The further hearing of this appeal on the merits was postponed.

Solicitors: *Phelps, Sidgwick & Biddle; H. C. Morris; Layton, Sons & Lendon; Snow, Snow & Fox; Rawlings & Butt.*

M. W.

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1895
ROMER J.
Jan. 18, 21, 22.
C. A.
April 29, 30.

In re DENSHAM'S TRADE-MARK.

Trade-Mark—Capacity for Registration — Fancy Word—Invented Word — Reference to Quality of Goods—Geographical Name—Patents, Designs, and Trade Marks Acts, 1883 *and* 1888 (46 *&* 47 *Vict. c.* 57, *s.* 64; 51 *&* 52 *Vict. c.* 50, *s.* 10).

A tea-dealer registered the word "Mazawattee" as a trade-mark for tea and other articles of food under the Patents, Designs, and Trade Marks Acts, 1883 and 1888. The tea was mostly imported from Ceylon, and the word registered was compounded of "maza," which means relish in Hindustani, and "wattee," which means an estate in Cingalese; but the compound word had no meaning in either language. There was no estate in Ceylon named "Mazawattee":—

Held, on an application to expunge the trade-mark, that the word "Mazawattee" was a good trade-mark, being a fancy word under the Patents, Designs, and Trade Marks Act of 1883, and an invented word under the Act of 1888, having no reference to the quality of the goods, and not being a geographical name.

The decision of Romer J. affirmed.

DENSHAM & SONS had for some years prior to 1886 carried on the business of wholesale tea-dealers in the City of London, and early in that year they established a separate branch of their business for the sale of their packets. Being advised that it would be necessary to identify their trade-mark with a particular name to be registered as a trade-mark, they determined to adopt a word, or combination of words, which would express as nearly as possible the wording in the body of the label which they intended to adopt, especially the word "luscious."

One of the firm accordingly went to the Guildhall Library, and on his report, made after searching the books there, the firm proposed to adopt as their trade-mark the word "Mazadharwattee," which was composed of the Hindustani word "mazadhar" (1), meaning "luscious," and the Cingalese word "wattee," which indicates a "garden" or "estate." At the suggestion of the printer "Mazadhar" was shortened to "Maza," which in Hindustani means "taste" or "relish," and the trade-mark ultimately adopted was the word "Mazawattee," which they

(1) This should be *mazadár*, one of the many pure Persian words current in Hindustani.—F. P.

extensively used in connection with the packet-tea branch. On the packets there was a label containing the following words: "Mazawattee, a high-class tea from the sweet-scented island, Ceylon, which produces the most luscious tea in the world." On January 7, 1887, the firm applied, under the Patents, Designs, and Trade Marks Act, 1883, to the Comptroller of the Patent Office, Trade Marks Branch, for registration of "Mazawattee" as their trade-mark in Class 42, for tea, and the registration was granted and certified, the registration number being 60,774.

On July 11, 1889, the firm applied under the Patents, Designs, and Trade Marks Act, 1888 (which came into operation on January 1, 1889), for registration of "Mazawattee" for the rest of the substances comprised in Class 42, namely, for "substances used as food or as ingredients in food, excepting tea," and registration was granted and certified, the registration number being 91,541.

On September 27, 1893, the firm applied for registration in Class 42 of a trade-mark, consisting of a picture of "Old King Cole," with those words written above it. The king was represented with a cup in one hand and another cup on a table beside him, the word "Mazawattee" appearing on each cup. Registration of this mark was duly granted and certified, the registration number being 175,322.

There was no estate in Ceylon with the name of "Mazawattee."

A. H. Deakin in 1892 applied for registration in Classes 42, 43, and other classes of the fancy word "Marza" as his trade-mark, but although he obtained registration of this mark in classes other than Class 42, he was refused registration in that class on the ground of the similarity of "Marza" to "Maza," the abbreviated form of "Mazawattee." Deakin accordingly moved that the Register of Trade Marks might be rectified by removing therefrom the three trade-marks of Densham & Sons, or so much thereof respectively as consisted of the word "Mazawattee."

The application came on for hearing before Romer J. on January 18, 1895.

Moulton, Q.C., Hopkinson, Q.C., and *J. Cutler*, for the applicant. The applicant is a "person aggrieved" within the meaning

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of s. 90 of the Patents, Designs, and Trade Marks Act, 1883. The word "Mazawattee" is not a good trade-mark under that Act, or under the Patents, Designs, and Trade Marks Act, 1888. Under s. 64 of the Act of 1883 it would only be good if it were a "fancy word or words not in common use." But it is not a good fancy word within the section because it is descriptive and is not "obviously meaningless" as applied to the article in connection with which it is used: *In re Van Duzer's Trade-mark.* (1) And it does not follow that a word is meaningless because it consists of one or more words taken from a foreign language or languages: *In re Jackson Co.'s Trade-mark* (2); *Davis* v. *Stribolt* (3); *In re Vignier's Trade-mark.* (4)

The word is also bad as a trade-mark under the Act of 1883, on the ground that it is a deceptive word, inasmuch as it indicates untruly that the tea is the growth of a particular estate or locality.

The word is not a good trade-mark under s. 10 of the Act of 1888, because it is not (*a.*) an "invented word," or (*b.*) "a word having no reference to the character or quality of the goods," and because (*c.*) it is a "geographical name."

It is not invented, for it is a combination of two existing words: *In re Sir Titus Salt, Bart., Sons & Co.'s Application* (5); *In re Farbenfabriken Application.* (6) It refers to the character of the goods by indicating that the tea is of a particular growth. It is a geographical name because it purports to point out the place from which the tea comes, and it is none the less geographical because a place is referred to which has no existence.

Sir R. E. Webster, Q.C., Cozens-Hardy, Q.C., Neville, Q.C., and *Sebastian,* for Densham & Sons, were not called upon.

Romer J. Cases which have sustained opposition to trade-marks on the ground that those trade-marks were not invented, or were calculated to deceive, or represented the character or quality of goods, have certainly gone very far. Possibly the mercantile community may think that they have gone beyond what is really fair from a purely mercantile point of view. But

(1) 34 Ch. D. 623, 644.
(2) 6 Rep. Pat. Cas. 80.
(3) 6 Rep. Pat. Cas. 207.
(4) 6 Rep. Pat. Cas. 490.
(5) [1894] 3 Ch. 166.
(6) [1894] 1 Ch. 645.

whether that is so or not, in my opinion, if I upheld the opposition in the present case, I should be going beyond any previously decided case, and I should be doing that which in my opinion would be unjust to the owners of these trade-marks.

Now, the opposition to this trade-mark may be shortly stated in this way. It is said that the trade-mark "Mazawattee" is a geographical expression as applied to tea and coffee, that it implies a Ceylon origin, that it is descriptive or deceptive, and that on these grounds the mark is a bad one. This mark has been registered for many years without complaint by any one, and I am satisfied, on the evidence, without any person being in fact for a moment deceived. But that, of course, is not conclusive, and I have still to consider whether the grounds of opposition are valid. Certainly it would be a great misfortune if the Court found itself obliged in this case to hold that the trade-mark was invalid.

Now, in the first place, the word was an invented word as a matter of fact. At the time when it was composed there was no such word existing in any language—certainly no such word known to any class in this country. We know how it came to be invented. It was invented in this way: the word "mazadhar" was an inaccurate transcription of a Hindustani word which meant something like luscious. That was found rather too long in itself as part of a combined word, and it was cut down to the short word "maza." The word "maza" in itself exists in the Hindustani language as a substantive, and apparently means "taste." Such a word as "maza" or "mazadhar" would be wholly unknown to Cingalese ears. That is in evidence and is not in dispute, for, amongst other reasons, this, that there is no letter like "z" at all in the Cingalese language. Then the other portion of the word is taken from the word "wattee" or "watta," which is a Cingalese word, and in itself means a garden, or estate, or a growth.

At the time that this word was invented the position of affairs was this: The Cingalese tea trade was in its infancy. At that time there were a few, but very few, estates in Ceylon, which were sending tea over to this country. Some of these, but a few only, had a name ending in "wattee"; but "wattee" was

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wholly unknown in the tea trade generally, and still more so to the general public here, as a word having any signification whatever, except that amongst the brokers who attended the sales at Mincing Lane it might have been known that there were a few estates with names that had this termination "wattee," and some of those brokers might have known the meaning of that in Cingalese. But it is to be noted that at all sales that were made at the Mincing Lane sale-rooms of tea, the produce of any particular estate, even of the estates whose names terminated in "wattee," was sold as the produce of the estate which was mentioned, and the word "estate" was always used after the name of that estate even in the cases where the name ended in "wattee." As one of the witnesses, Mr. Wilson, said—and he was a witness on whom I felt I could rely—if the Mincing Lane brokers, those few who did have some little acquaintance with the word "wattee," had seen a box of tea come over for sale with a name upon it ending with "wattee," and it was not sold as the produce of a particular estate, they would not from that fact have assumed that it was the produce of an estate at all, but that it was sent by some Cingalese merchant; and the same witness stated that there were many merchants in Ceylon who used trade-marks of their own which were not connected with estates. So that even to the Mincing Lane experts the term "Mazawattee" would not have conveyed in itself the idea that it of necessity at all represented any estate in Ceylon or elsewhere. In England, speaking generally, the term was wholly unknown. It has since become somewhat better known; but I believe that is chiefly due to the fact of the respondents in this case having so much advertised their special trade-mark, and to the fact that there have been used since numerous other trade-marks which terminate in "wattee." I have no doubt that since the time the word "Mazawattee" was first invented there have been more estates growing tea in Ceylon whose names terminate in wattee, but even at the present day, though there are, I believe, about nine hundred estates in Ceylon, there are only about twenty-eight whose names terminate in "wattee" or its equivalent.

Now I have to consider this: Has the term "Mazawattee" any

meaning in England in the first place? I come to the conclusion that in English it is meaningless. It conveys no meaning to any ordinary Englishman, or to any class of Englishmen. It has no definite meaning in Hindustani, because although a speaker of that language would recognise the first half of the word, he would be utterly at a loss to understand the meaning of the latter half. It would be of no meaning to a Cingalese, because, although he would give a meaning to the latter half, he would see that the former half was wholly unconnected with his language or with Ceylon, and he could give no possible meaning to it. I believe, therefore, that the word "Mazawattee" has no meaning in any known language.

But it is said that to Englishmen or to certain classes of Englishmen it would indicate a Cingalese origin. I do not see of necessity why that should be so, any more than that it should indicate an Indian origin; but I feel certain that it does not represent to any class in this country or elsewhere a reference to any definite locality or to any definite estate or place. It is a non-English word, and I agree with the applicant that no doubt to English ears it has an Eastern sound; and if it conveys an idea to ordinary people here, it probably conveys the idea of the East generally. But I need scarcely say that that would not be sufficient to justify me in saying that this trade-mark was bad as being geographical or as referring to a particular locality, or as referring to the quality or character of the goods in the class in which it is registered. It cannot be that merely because a word has an Eastern sound, therefore it is to be held by the Court here to denote some place in the East, and therefore to be treated as either geographical or descriptive. The word "Mazawattee" describes no place in fact; and in my opinion it is not descriptive either as being geographical or as being calculated to deceive. I do not believe that to English ears, or to any class of English ears, it denotes an estate of necessity, or in probability, in any particular district.

Reference was made by the applicant in supporting the present application to some observations of the Lords Justices, and in particular of Cotton L.J., in *Van Duzer's Case*. (1) But those

(1) 34 Ch. D. 623.

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observations, and especially the observations of Cotton L.J., must, in my opinion, be considered with regard to the case he was dealing with, and to words which in themselves are either English or have a meaning in this country, or to some classes in this country. As I have said, I do not consider that the term "Mazawattee" is in any true sense deceptive. I do not think it would lead people here to suppose that it meant an estate in Ceylon, or that the tea to which its name was attached was tea coming from some particular estate in Ceylon. Some witnesses there were on behalf of the applicant who in a somewhat peculiar way affirmed that they had been deceived. I can only say this, that they were cross-examined, and in cross-examination they wholly broke down; and I am satisfied that in fact up to the present time by the use of this word "Mazawattee" by the respondents there has been no deception in fact. I may mention that the advertisements they have issued—though this is not essential for the part of the case I am now considering—have always shewn that they were dealing with teas which did not come from any particular estate. Although it is admitted, or practically admitted, that by the ordinary English public no meaning would be attached to the word "wattee," yet it was said that to a special class it would have a meaning. Now, I cannot see what that special class is. The only class I can think of as meant are those wholesale dealers who attend the sale-rooms at Mincing Lane; but I have already referred to Mr. Wilson's evidence on the point, and as the result of the evidence I am satisfied, putting aside some possible isolated persons, that the experts who attend Mincing Lane would not treat this trade-mark as denoting any particular estate, and certainly would in no way be deceived by its use—not because this trade-mark ever comes before those experts, for it never does; it is used only in this country for the teas sold by the respondents, and they deal in blended teas, and carry on what is known as a packet business. I certainly am not bound to consider the case, or the possible case, of a few isolated individuals who, having now been told by some one, or having ascertained that the word "wattee" in Cingalese means an estate, choose to say that therefore they understood "Mazawattee" as meaning a particular

estate in Ceylon, and that without inquiry at all. I refer to what Lindley L.J. said in *In re Van Duzer's Trade-mark* (1), "The Act of Parliament is for an ordinary Englishman," by which I understood this, that a trade-mark which cannot be impeached when you consider Englishmen—not necessarily as a whole, but any class of Englishmen—cannot be impeached because you get a few isolated individuals who choose to attribute special meanings or have special intelligence concerning the trade-mark. With reference to the case that was referred to on behalf of the applicant, *In re Jackson Co.'s Trade-mark* (2), a decision of Kay L.J. (then Kay J.), I would only say this, that that case in the first place is perfectly distinguishable from the present; for in the present case, not only no Englishman, but no Cingalese, as I have already pointed out, could be misled by this term "Mazawattee" being used as a trade-mark, even assuming that the goods of the respondents marked with their trade-mark went out to Ceylon. The evidence that "Mazawattee" would have no meaning whatever to a Cingalese has not been challenged in substance.

For these reasons, I think that the grounds on which the applicant bases his case fail, and, as I have said, I think there is no case that he can refer to which would be an authority in the case before me. I have already dealt with two cases; but I will briefly refer to some other cases which the counsel on behalf of the applicant have referred to. Take the case of *Davis* v. *Stribolt* (3)—a decision of Chitty J. What was the ground of the decision there? The ground was this: that in reference to an article produced in a foreign country and imported into England, where it was previously unknown and without a name, the name used in that foreign country, or some term to describe it or denote the article, is not a fancy word within the meaning of the Act. With that I thoroughly agree, if I may respectfully say so, and I need scarcely say that that case has no application to the one now before me.

Then there was the *Eboline Case.* (4) That case is again

(1) 34 Ch. D. 643.
(2) 6 Rep. Pat. Cas. 80.
(3) 6 Rep. Pat. Cas. 207.
(4) *In re Sir Titus Salt, Bart., Sons & Co.'s Application* ([1894] 3 Ch. 166; 11 Rep. Pat. Cas. 517).

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perfectly distinguishable. Chitty J. in that case had before him this fact—that there was an Italian town of considerable size called Eboli, and that what it was desired to register in the case before him was the term "Eboline," that is to say, the name of a town of considerable size with a mere suffix added. He came to the conclusion that in that case there was no invented word whatever. That clearly is no authority as to, and has no real bearing on, the case with which I have to deal.

The next case referred to was *In re Farbenfabriken Application.* (1) That was the case with regard to the word "Somatose." There it was held on the facts before the judge who decided the case in the first instance, and the Lords Justices, or the majority of them, that the words had reference in this country to the character or quality of the goods. In the case before me I have come to the conclusion that the word "Mazawattee" has no meaning in this country in reference to the quality or character of the goods.

As impeaching that finding, reference was made to the declaration which the respondents in this case made in answer to an application by the present applicant to register the applicant's alleged trade-mark "Marza"; but with regard to that declaration, if the word "Mazawattee" itself is not descriptive—and I hold it is not—it will not be rendered descriptive as against the respondents merely because descriptive words in foreign languages led to the invention and adoption of that word here; and that remark disposes of the argument of the applicant founded on the declaration of the respondents, which I have referred to. I think the true meaning of that declaration was this—that in explaining how the word "Mazawattee" came to be used they referred to certain foreign words as having certain meanings.

The last case I need refer to is the case of *In re Vignier's Trade-mark.* (2) That was the case with regard to the word "Monobrut." With regard to that, all I say is this: Kay J. came to the conclusion, as a matter of fact, that the sole meaning of that word to many in this country, and certainly to those classes who were concerned in the buying of wine, was "Very

(1) [1894] 1 Ch. 645. (2) 6 Rep. Pat. Cas. 490.

dry" as applied to wine, and, that being so, he naturally held that it was descriptive. For the reasons I have already given, this case differs from that in its facts, and that case, therefore, is no authority for the applicant in the case before me.

I perhaps should have said with reference to the case of *In re Jackson Co.'s Trade-mark* (1), dealing with the word "Kokoko," that, speaking with the greatest respect for the learned judge who decided it, I do not know that I should have come to the same conclusion as to its being deceptive because the goods to which it was attached might possibly have come before the Chippeway Indians, before whom, at the time Kay J. decided the case, they had never come. I should have been disposed to think that the chance of the Chippeway Indians getting these goods and being deceived was so remote that the Chippeway Indians might have been left to take care of themselves; but still, even if one may differ from the particular view which Kay J. took in that case, it is one which he was entitled to take; and, taking the grounds on which Kay J. based his decision in that case, as I have already pointed out, it is no authority in the case before me, because, as I have already mentioned, even in England the term "Mazawattee" has no distinct meaning whatever.

For these reasons I hold the application fails, and must be dismissed with costs.

F. E.

C. A.

From this decision the applicant Deakin appealed. The appeal came on for hearing on April 29, 1895.

Moulton, Q.C., Hopkinson, Q.C., and *J. Cutler*, for the appellant, contended, as in the Court below, that the word "Mazawattee" was deceptive, that it was not a fancy word, that it was descriptive of the character and quality of the goods, and that it was a geographical name. They cited *In re Van Duzer's Trade-mark* (2); *In re Jackson Co.'s Trade-mark* (1); *In re Vignier's Trade-mark* (3); *In re Farbenfabriken Application* (4); *Hodgson* v.

(1) 6 Rep. Pat. Cas. 80.
(2) 34 Ch. D. 623.
(3) 6 Rep. Pat. Cas. 490.
(4) [1894] 1 Ch. 645.

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Sinclair (1); *In re Talbot's Trade-mark* (2); *Davis* v. *Stribolt* (3); *In re Sir Titus Salt, Bart., Sons & Co.'s Application* (4).]

[LINDLEY L.J., referred to *In re Trade-mark of La Société Anonyme, &c.* (5)]

Sir R. E. Webster, Q.C., Cozens-Hardy, Q.C., Neville, Q.C., and *Sebastian,* for the respondents, were not called on.

LINDLEY L.J. I have thought from the commencement that this appeal was hopeless. The reasons given by Romer J. cannot, I think, be improved upon by me; but I will make one or two observations to shew the reasons why I concur in his view.

The application is to take off the Register of Trade Marks a word which has been on ever since 1887. Messrs. Densham & Sons registered this word "Mazawattee" in respect of tea in that year. Later on, some time in 1889, they registered it for other goods in Class 42. Class 42, according to the classification adopted under this Act, runs thus: "Substances used as food or as ingredients in food, such as cereals, pulses, olive oil, hops, malt, dried fruits, tea, sago, salt, sugar, preserved meats, confectionery, oil cakes, pickles, vinegar, beer clarifiers." That is the class. It appears, for the reasons which have been explained by Mr. Moulton, that the present appellant desired to have that removed. He says he is a person aggrieved because in attempting to register some other word he has been embarrassed by the existence upon the register of this word "Mazawattee." I do not pause to consider whether he is aggrieved or not, and assume that he has a locus standi to appeal.

Now, what is the objection? First of all, let us take the original word which was registered in 1887. That was registered under the Act then in force, which was the Patent Act of 1883, and Messrs. Densham were entitled to register that word under the head in s. 64, sub-s. 1, clause (*c*), of "a distinctive device, mark, brand, heading, label, ticket, or fancy word or words not in common use." They say this was a fancy word not in common use. Now, was it? The answer to that, I think, is

(1) 9 Rep. Pat. Cas. 22.
(2) 11 Rep. Pat. Cas. 77.
(3) 6 Rep. Pat. Cas. 207.
(4) [1894] 3 Ch. 166; 11 Rep. Pat. Cas. 517.
(5) [1894] 2 Ch. 26.

clear. It certainly was a word not in common use. As to its being a fancy word, did anybody ever hear of it before? That is one test.

Then it is asked, How is it compounded? I do not care how it is compounded. It is said it is compounded of the word "wattee," which in Cingalese means "estate" or "garden," and "maza," which is part of a larger word, "mazadhar," meaning "delicious." Now let us look at the word and ask anybody who understands Hindustani, who knows Cingalese, who knows English and the tea trade, whether he knows or ever heard of such a word, and he would tell you No. To say that such a word as that is not a fancy word, I confess, is beyond me altogether. If it is not a fancy word, I should like to know what is. I do not believe that any human being could invent a word which would be a fancy word if this word is not one.

Then, with regard to the Act of 1888, in which the language is a little different, what is requisite under that Act is an invented word subject to this qualification, that it must have no reference to the character or quality of the goods, and must not be a geographical name. As to its being invented, I have said enough about its being that in the sense which I have mentioned, and I cannot think there can be any dispute about its being an invented word. The real question is whether it comes within the qualification—that is to say, whether it refers to the character or quality of the goods, and is not a geographical name. Now let us take the character or quality of the goods. With regard to that, I have heard ingenious remarks made by the counsel for the appellant upon this point, and I can only put it in the shape of a question: What character or what quality is referred to? If you talk about its being a descriptive word, I ask what it describes. The answer is, that it describes nothing; it does not refer to the character of the goods, or to any quality of the goods. It is, indeed, contended that Mr. Densham wanted to find a word which would describe as near as possible what he had put on his packet, which was this: "A high-class tea, from the sweet-scented island, Ceylon, which produces the most luscious tea in the world." And it is suggested that he found the word "mazadharwattee," which is a combination of a Hindustani word

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and a Cingalese word, and which denoted more or less what he wanted, namely, a description of the character or quality of the goods. The simple answer is, that that is not the word adopted. He has not taken the word "mazadharwattee," which possibly might with a certain amount of ingenious explanation be held to refer more or less to the character or quality of the goods; but he has taken a word which you cannot find anywhere, and which you cannot compound except in the ingenious way suggested, that there is in Hindustani a word "maza," meaning "taste," and there is in Cingalese the word "wattee." But I think such reasoning is really too childish for serious argument. Therefore, with regard to the Act of 1888, let us ask ourselves, Does this word "Mazawattee" refer to the character or quality of the goods? My answer is, Certainly not, having regard to the evidence in the case.

Then it is said, If it does not, it is a geographical name. The name of what? There is no such place. It is said, You can make it out in this way. "Wattee" means an estate or garden, and it refers more or less to Ceylon. That is not the question. The question is whether this word "Mazawattee" is a geographical name. The answer is, No, there is no such place known. Then it is said that such a name may be a geographical name, although there is no such place; and Mr. Hopkinson has suggested that, if some old geographer had made a mistake, and had put some name upon a place which nobody could find, it must be regarded as a geographical name, though nobody could find the place. I do not know whether that would be so or not; but when you come to modern times, and give the name "Mazawattee" to a place which cannot be found, which never has acquired by reputation or otherwise a geographical name, the thing is really absurd. I think it is a ridiculous appeal. I wish it to be distinctly understood that it is not our business to fritter away this Act of Parliament. If we were to accede to the argument pressed upon us, I defy anybody to invent a word which would satisfy the provisions of the Act.

LOPES L.J. I am quite of the same opinion. I agree with what has been said by my learned brother, Lindley L.J., that

the cases have gone quite far enough, and if they go any further I think the effect will be to entirely nullify the provisions of the Act of Parliament with regard to these trade-marks.

I do not propose to give any definition of "fancy word" beyond that which I gave in *Van Duzer's Trade-mark Case*. (1) I am by no means, I hope, as a general rule enamoured of a general definition of my own—quite the contrary; but I think, as far as I can judge, that that definition was not an inaccurate one, and I am the more confirmed in that view because I think the definition adopted in that case has been followed in subsequent cases. It comes to this: to be a fancy word it should be meaningless—it should be obviously, notoriously inappropriate to the article to which it was applied. I am dealing now at the present moment with the Act of 1883.

Now, is not this a fancy word within that definition? I do not know any better way of dealing with that point than to read what was said by the learned judge of the Court below. [The Lord Justice read the passage, "Now I have to consider . . . any known language," pp. 180, 181, ante.] I entirely agree with that. That conclusively shews that at any rate this was a fancy word within the meaning of the Trade Marks Act, 1883, and that it is not descriptive of the article I think is perfectly clear.

Then I come to the Act of 1888. That substitutes a new definition. Instead of "a fancy word or words not in common use," the Act of 1888 has these words: "An invented word or invented words, or a word or words having no reference to the character or quality of the goods, and not being a geographical name." The effect of sub-ss. (*d*) and (*e*) of that section is that it may be an invented word, but that it will not do if it has any reference to the character or quality of the goods, or is a geographical name.

Now, is this an invented word? I have already said that I agree with what was said by the learned judge of the Court below in the passage I have just read from his judgment. A word that does not exist in any language, and as far as all the evidence goes, and as far as one's own common sense goes, had no previous existence before it was used for the purposes of the

(1) 34 Ch. D. 623.

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Trade Marks Acts by the person who then had it registered, is an invented word. But then, as I have said, that will not do if it has reference to the character or quality of the goods. Has it? In my opinion, as I have said, it has no reference whatever to the character or quality of the goods. Nor do I think it has reference to locality, as coming from some garden in Ceylon.

I come, therefore, to the conclusion that in no sense can it be said to be anything else but an invented word, and an invented word that has no reference to the quality or character of the tea, and is not a geographical description of the place from whence it comes.

I think the judgment of the learned judge below was absolutely correct, and I entirely agree with him.

KAY L.J. I agree, and I have nothing to add.

Appeal dismissed.

Solicitors: *Ernest Salaman, Fort & Co.; Wynne Baxter & Keeble.*

M. W.

C. A. 1895 *May* 6, 7.

In re HODGKINSON. HODGKINSON *v.* HODGKINSON.

[1894 H. 3567.]

Practice—Trustee's Costs—No Order made as to Costs—Right of Trustee to retain Costs out of Estate.

A summons having been taken out by a beneficiary for the administration of a testator's estate under which several questions arose with respect to the accounts of the trustee and his management of the property, the judge made an order as to the questions in dispute, and ordered the accounts to be taken, and declared that "he did not think fit to make any order as to the costs of the action":—

Held, that this declaration was a judicial decision that the trustee was not entitled to his costs in the action; and that he had no right to retain them out of the estate.

JAMES HODGKINSON, by his will dated November 15, 1878, gave his residuary real and personal estate to his wife Lavinia during her life, with remainder to his daughter Florence Mary; and if his wife should die before his daughter attained the age

of twenty-one years, he directed that the income should be applied to her maintenance during her minority, and on her attaining twenty-one the worth of the property should be paid to her by the surviving executor in portions at the periods mentioned in the will; and he directed that if she died under twenty-one unmarried and without issue the property should go, subject to certain legacies, to his nephews and nieces. And he appointed his wife and S. Hodgkinson his executors and trustees, and Sarah Bennett guardian of his infant daughter.

The testator died in March, 1880, and his wife died in June, 1890. His daughter did not attain twenty-one till July, 1894.

After the death of the testator's widow, S. Bennett, the testamentary guardian, became dissatisfied with S. Hodgkinson's management of the property, and questions arose as to whether certain payments for repairs and other matters were payable out of capital or income. The guardian therefore took out a summons against him as next friend of the infant daughter (1893 H. 1261), calling on him to render his accounts, charging him with wilful default, and asking for the appointment of two new trustees of the will. The persons entitled in remainder were not served.

The summons was heard on May 15, 1893, by Kekewich J., who gave directions as to certain payments, and ordered the defendant to bring in his accounts, with liberty to apply. No order was drawn up, but the accounts were brought in and vouched.

On August 7, 1893, the summons was brought on again before Kekewich J., who made an order by which, after stating that "several questions, arising upon the defendant's accounts, having been brought before the judge in chambers and directions having been given thereon, and the plaintiff S. Bennett by her counsel admitting that the defendant under such directions had paid to her as testamentary guardian of the infant plaintiff all income accrued down to the present time in respect of the residuary real and personal estate of the testator," it was ordered "that the defendant do pay the future income to the said plaintiff S. Bennett as such testamentary guardian as aforesaid. And the judge doth not think fit to make any order as to the costs of the action."

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On October 4, 1894, Florence Mary Hodgkinson, being then of age, took out a fresh originating summons against the defendant S. Hodgkinson (1894 H. 3567), asking for the opinion of the Court upon the construction of the will, under which Kekewich J. made an order on November 12, 1894, declaring that the whole residuary estate of the testator belonged to the plaintiff absolutely, and directing the defendant to account for a sum of 58*l.* which he had received for sale of stock, and that he should be at liberty to retain the costs, charges, and expenses of the application out of the estate, to be taxed as between solicitor and client, with liberty to apply.

The defendant S. Hodgkinson claimed to retain out of the estate the costs, charges, and expenses incurred in the previous proceedings commenced by S. Bennett against him (1893 H. 1261), and with respect to which the learned judge had declined to make an order as to costs on August 7, 1893. A summons in the second action was accordingly brought on under the liberty to apply to obtain the opinion of the judge upon this point. The matter was adjourned into court on February 9, 1895, when Kekewich J. made an order declaring that the defendant had no right to retain and pay the costs of the previous action out of the estate of James Hodgkinson, and that he must pay the costs of the present application. The defendant obtained leave to appeal from this order.

J. M. Stone, for the appellant. The right of a trustee or executor to retain his costs out of the funds in his hands is untouched by the General Order as to costs, Order LXV., r. 1. It is a matter of contract between himself and the testator or settlor who appointed him, and cannot be lost without an express judicial decision. There has been no such decision in this case. The judge probably made no order as to costs because the persons entitled in remainder were not present, and he thought the estate was not sufficiently represented; but he expressed no opinion against the conduct of the trustee. His right to retain his costs, therefore, still remains: *In re Love.* (1) There is no reported case in which the refusal of a judge to make an order

(1) 29 Ch. D. 348.

as to costs has had the effect now contended for. The new Order LXV., r. 14 (*a*), would have been unnecessary if the mere fact of no order being made as to costs could deprive a trustee of his right of retainer.

Manning, for the plaintiff. The judge had full jurisdiction to deprive the trustee of his costs on the administration summons, or to order them to be paid out of the estate. The estate was sufficiently represented for that purpose. The beneficiaries asked that the trustee should pay the whole costs; but the judge made no order as to the costs, thereby meaning that each party should bear his own costs. He has himself stated that to have been the intention of his order; and it is the meaning which that form of words has always been held to bear. It was a clear judicial decision that the trustee was not to retain his costs out of the estate: *In re Beddoe* (1); *In re Medland.* (2)

J. M. Stone, in reply.

LINDLEY L.J. I do not think that there is any real difficulty in this case. Mr. Stone is quite right in his general proposition that the right of a trustee to his costs is preserved to him by Order LXV., r. 1. [His Lordship read that rule, and shortly stated the facts set forth above, and continued:—]

There was a controversy between the guardian of the infant, who was in the position of a tenant for life, and her trustee, as to whether the costs of certain repairs should come out of capital or income. They took different views of the matter. The guardian took out a summons to determine the question. The proper parties to the summons were the person in the position of a tenant for life and the trustee. Such a summons would not be served upon all the cestuis que trust. Kekewich J. settled the point in controversy in favour of the infant, and declared that the expenses of the repairs were to come out of capital, and directed the trustee so to pay them, and the order concluded with these words: "And the judge doth not think fit to make any order as to the costs of the action." What does that mean? The appellant's counsel says it means nothing, and that the order means neither more nor less than if that passage had been

(1) [1893] 1 Ch. 547. (2) 41 Ch. D. 476.

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left out of it. I cannot take that view. It seems to me that this is a common form of order perfectly familiar to all of us, and it means that the judge, having had his attention called to the matter, and being asked to make an order for payment of the costs, declines to do so. It is not the same as if he said nothing: the effect is that each party must pay his own costs. If so, how is that consistent with the retainer by the trustee of his costs out of the estate? I cannot think it is. We must remember that this was an action between a trustee and his cestui que trust, and if the judge says, "I make no order as to costs," that negatives the primâ facie right of the trustee to take his costs out of the estate. Moreover, the judge has himself said he meant that to be the effect of the order. Whether the order disallowing costs was in itself right or wrong we cannot now inquire; but when the trustee threatened to take his costs out of the moneys in his hands, and the cestui que trust took out a summons to direct that he should not do so, Kekewich J. made an order negativing his right; and I think that order is right, and the appeal must be dismissed with costs.

LOPES L.J. I am of the same opinion. I am not able to appreciate the argument of the appellant's counsel. The question turns on the proper construction of the words of the order, "The judge doth not think fit to make any order as to the costs." I should have thought it as clear as anything can be. The judge says he does not think fit to make any order as to costs, and that can only mean one thing—namely, that each party is to pay his own costs. The form is well known, and has been constantly used by all of us to mean what I have said. The appellant's counsel says that that is not the true meaning, and that it is just the same as if the words were not in the order, and that he may retain his costs out of the estate notwithstanding. It seems to me that that cannot be so; it must have been intended that the words should have some effect; and that contention cannot for a moment be maintained. I suppose that the judge who made the order knew the meaning of his words, and when the words were brought to his attention he said that he did mean that the

trustee should not retain his costs. The appeal must be dismissed with costs.

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KAY L.J. The order of August 7, 1893, contained the words, "And the judge doth not think fit to make any order as to the costs." What is the effect and meaning of that? It is necessary to see what power the judge had to make the order as to costs at that time in that proceeding. [His Lordship stated the facts of the case, and continued:—]

The estate was sufficiently represented upon the summons for the judge to be in a position to choose any one of three alternatives, either that the trustee should have his costs out of the estate, or that the appellant should pay them, or that the trustee should pay them. What is the effect when the judge said he did not think fit to make any order as to costs? What does it mean but that it left the trustee to pay his own costs? I should have no doubt at all about it except that the appellant's counsel contended the order was made in this form because the judge thought the estate was not sufficiently represented. I do not agree that the estate was not sufficiently represented to enable the judge to make that order; and when we look into the matter we find that that was not the reason. The judge considered the trustee had not behaved in a reasonable manner in paying the expenses out of income instead of out of capital. It is not possible to come to the conclusion which was urged upon us by the appellant's counsel, that the estate was not sufficiently represented. It was represented by the tenant for life and the trustee, and it would have been in the power of Kekewich J. to say that the costs should come out of the estate. But he did not do that. Then the new summons was taken out to prevent the trustee from retaining his costs out of the estate notwithstanding the first order, and the judge had to consider what he had meant by the words he had used. On February 9, 1895, the learned judge said that what he meant was that the costs should not come out of the estate. There has been no appeal against the order of August 7, 1893, nor could there be now. Under these circumstances we have only to say what is the meaning of the order. In my opinion, the trustee had clearly no right to retain his costs.

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I will not go into the question whether the judge was right or wrong in making the order originally. In 1895 he did the only thing he could do when he refused to allow the costs to be retained. The appeal seems to me to fail, and to fail with costs.

Appeal dismissed.

Solicitors: *Hudson, Matthews & Co., for J. Bamford, Son & Matthews, Ashbourne; C. E. Beal.*

M. W.

C. A. 1895 *May* 22.

In re STONE. BAKER *v.* STONE.

[1892 S. 4858.]

Will—Construction—Gift per Stirpes or per Capita.

A testator gave real and personal estate to his wife for her life, and directed that after her death the income should be equally divided between his brother and sisters therein named, "at the decease of either of my before-named brother or sisters their interest herein to be equally divided amongst their children, and after the decease of all I desire the whole of my property to be sold, moneys called in, &c. &c., and to be equally divided between the children of the aforesaid share and share alike":—

Held, by Stirling J., following *Brett* v. *Horton* (4 Beav. 239), that the division of capital among the nephews and nieces must be per stirpes:

Held, by the Court of Appeal, that the ultimate gift to the nephews and nieces was a clear gift per capita, and could not be controlled by the fact that so long as any brother or sister of the testator was living the income was divisible per stirpes.

THIS was an appeal from a decision of Stirling J. that the nephews and nieces of the testator took under his will per stirpes.

John Stone, by will dated January 10, 1841, disposed of his property as follows:—

"I give and bequeath to my wife Mary Ann all that messuage or dwelling-house known by the name of the Angel Inn together with the cottage adjoining garden orchard outhouses and the whole of the premises thereunto belonging, with all my furniture stock-in-trade plate and all other property I may be

possessed of at the time of my decease (the cash in the house to be for her sole use without let or hindrance), and I likewise give my said wife the rent of those two pieces or parcels of land situate &c. And I also give unto my said wife all interest moneys arising from moneys due to me whether on mortgages bonds notes of hand or any other security whatsoever, all the above-named property to be for her sole use during her life without let or hindrance or control of any future husband, subject nevertheless to the payment of all my just debts and funeral and testamentary expenses. And after the decease of my said wife the proceeds arising from my aforesaid property to be paid to my brother and sisters yearly to be equally divided between them namely Chas. W. Stone, Catherine (wife of T. Carrington), Susan (wife of T. Buck), and Ann (wife of M. Lott), without the control of their present or future husbands; at the decease of either of my before-named brother or sisters their interest herein to be equally divided amongst their children, and after the decease of all I desire the whole of my property to be sold, moneys called in &c. &c., and to be equally divided between the children of the aforesaid share and share alike."

The brother and sisters named in the will all survived the testator, and each of them had children, but some of them more than others. On the death of the widow, who survived the brother and sisters, the estate became divisible among their children, and the question arose whether they took per stirpes or per capita.

The point was argued before Stirling J., who, after referring to *Brett* v. *Horton* (1), *Nockolds* v. *Locke* (2), *In re Campbell's Trusts* (3), and *Smith* v. *Streatfield* (4), stated that the reasoning in *Brett* v. *Horton* (1) seemed to apply to the present case, and that the difference that in this case the persons interested all stood in the same degree of relationship to the testator, whereas in *Brett* v. *Horton* (1) they did not, did not appear to him sufficient to make a valid distinction between the cases.

His Lordship accordingly made a declaration that the proceeds of the sale and conversion of the testator's real and personal

(1) 4 Beav. 239.
(2) 3 K. & J. 6.
(3) 31 Ch. D. 685; 33 Ch. D. 98.
(4) 1 Mer. 358.

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estate were divisible among the respective children of the testator's brother and sisters living at his death (1) per stirpes and not per capita.

The children who would have gained by a distribution per capita appealed.

Ingle Joyce, for the appellant. The ultimate words are clear and unambiguous: there is no sufficient context to cut them down, and there is nothing irrational or unjust in the disposition effected by giving them their natural meaning. Stirling J. was embarrassed by *Brett* v. *Horton* (2), but it does not govern the present case. The division there was between a number of individuals and a class of children who were to take with the individuals. In such a case the question at once arises, whether the testator in directing an equal division between certain persons and a class of children does not look upon the class as together forming an individual. Moreover, in that case the division was to take place on an event relating only to the class of children, so that a division per capita on the happening of that event would have been irrational. Here those circumstances are wanting, and if the order under appeal stands it must be taken as settled that a plain gift to children per capita will be changed into a gift per stirpes if their parents take life estates. In *Nockolds* v. *Locke* (3) Wood V.C. distributed the fund per capita, distinguishing the case from *Brett* v. *Horton* (2) on grounds which are not very satisfactory. *In re Campbell's Trusts* (4) turns on the word "each," which does not occur here.

[KAY L.J. observed on the fact that the children of those of the brother and sister who had died took the income per stirpes until the last survivor of the brother and sisters died.]

That is not enough to control the plain words of the ultimate gift.

[KAY L.J. The Master of the Rolls said that the words of the ultimate gift in *Brett* v. *Horton* (2) were plain.]

Not so plain as here: they were words as to the construction

(1) There was no child born after the testator's death.

(2) 4 Beav. 239.

(3) 3 K. & J. 6.

(4) 31 Ch. D. 685; 33 Ch. D. 98.

of which a lawyer looking at the cases might have no doubt, but a layman would feel doubt. Here he would not. *Smith* v. *Streatfield* (1), referred to by Stirling J., is rather in my favour. The report is short and unsatisfactory; but it comes to this, that the children took per capita, since the death of one parent without issue produced no intestacy.

Vernon Smith, Q.C., for the respondents. There is a patent ambiguity in the ultimate gift, for double words of division are used, whereas single words are used only as to the income, which suggests a doubt whether the first words of division do not relate to the stirpes and the subsequent words to the division between the descendants of a stirps. A slight indication of intention then is sufficient to induce the Court to decide for division per stirpes. This indication is found in the division of income per stirpes as long as any brother or sister is living. *Brett* v. *Horton* (2) has never been questioned, and its reasoning applies to the present case. The sense in which it has been understood by text-writers is shewn in Jarman on Wills, 4th ed. vol. ii. p. 195. *Nockolds* v. *Locke* (3) is in my favour, for Lord Hatherley intimates that if the whole income of the fund had been given among the grandchildren per stirpes instead of merely an allowance for maintenance he would have followed *Brett* v. *Horton*. (2)

LINDLEY L.J. This is an appeal from an order of Stirling J., which, after some declarations which are not complained of, declares that the proceeds of the testator's estate are divisible among the testator's nephews and nieces per stirpes, and not per capita. The testator by his will gives a life interest in all his property to his wife for her life: "And after the decease of my said wife the proceeds" (by proceeds he evidently does not mean proceeds of sale, but the income of the property afterwards directed to be sold) "arising from my aforesaid property to be paid to my brother and sisters yearly to be equally divided between them namely (here follow the names); at the decease of either of my before-named brother or sisters their interest herein

(1) 1 Mer. 358.

(2) 4 Beav. 239.

(3) 3 K. & J. 6.

C. A. 1895 *In re* STONE. BAKER *v.* STONE. Lindley L.J.

to be equally divided amongst their children" (i.e., the children of the brother or sister dying, it not being disputed that while any brother or sister survives the division of income is per stirpes). "And after the decease of all" (i.e., my brother and sisters) "I desire the whole of my property to be sold, moneys called in, &c. &c., and to be equally divided between the children of the aforesaid share and share alike." Here "the aforesaid" must mean "my brother and sisters."

Why are we to take this to mean that the distribution is to be per stirpes? The obvious meaning of the words is, that the division is to be per capita, and the language is not open to ambiguity. But it is said that the language must be controlled, because so long as there is a brother or sister living the division of the income is per stirpes. But there is no sufficient indication of an intention that the capital should ultimately be divided in the same way. I think that the testator directed a division of the income per stirpes because he meant that the shares of the survivors of his brother and sisters in the income should not be interfered with. I cannot see how he could more clearly have expressed a division of the capital per capita without going on to use the expression "per capita," which would have been surplusage. I do not enter into an examination of the cases: when I see an intention clearly expressed in a will, and find no rule of law opposed to giving effect to it, I disregard previous cases.

LOPES L.J. I also am of opinion that the proceeds of sale must be distributed per capita. The ultimate words of gift standing alone would beyond all doubt make the distribution per capita. But it is said that the fact of the income up to the time of division being distributable per stirpes raises a presumption that the capital also is to be distributed per stirpes. I think that fact is not enough to raise such a presumption. The testator appears to me in substance to have said, "I desire my property to remain intact so long as any brother or sister of mine is living, and during that period the shares of income which they respectively take are not to be interfered with; but when the property is sold I intend all their children to take the proceeds share and share alike."

KAY L.J. On the face of the will it appears that the testator was entitled to real estate, and to moneys due on mortgages, bonds, notes of hand, and other investments, and he expresses himself so as to shew that he did not intend a conversion until the final period of division. Probably the investments produced a good income, and he did not wish to have that income reduced by conversion. What he means to be done when the brother and sisters are all dead is unmistakably clear: "I desire the whole of my property to be sold, moneys called in &c. &c. and to be equally divided between the children of the aforesaid" (i.e., of my brother and sisters) "share and share alike." No one contends that if these words stood alone the division would not be per capita. But it is said you can see from the context that this was not the testator's intention. A context ought to be very strong to alter the effect of such plain words. Now, what is the context? Until the brother and sisters are all dead there is a division of the income per stirpes. It does not at all follow from that that the testator did not intend a division of capital per capita. If the testator had instructed his solicitor to draw a will dividing the income per stirpes until the brother and sisters were all dead, and then dividing the capital per capita, what more appropriate language could have been used? We ought to abide by the language of a testator, and not alter it on conjecture. Stirling J. seems to have felt himself bound by the decisions; but I am against construing one will by another where the language of the two is not identical.

Solicitors: *Rowcliffes, Rawle & Co., for Hippisley, Bristol.*

H. C. J.

C. A.
1895
May 24.

BONHOTE *v.* HENDERSON.

[1894 B. 3870.]

Settlement—Voluntary Deed—Rectification.

THIS was an appeal by the plaintiffs from a decision of Kekewich J. (1)

Warmington, Q.C., and *Kirby*, for the appellants.
Badcock, for the trustee.

THE COURT (Lindley, Lopes and Kay L.JJ.) dismissed the appeal on the ground that the evidence was wholly insufficient to shew that the settlors at the time when the settlement was executed had an intention different from that carried into effect by the settlement. Their Lordships examined the evidence, but laid down no principle beyond referring to the observations of Cotton L.J. at the close of his judgment in *Tucker* v. *Bennett*. (2)

Solicitors: *Dawes & Sons.*

(1) [1895] 1 Ch. 742.

(2) 38 Ch. D. 1, 15.

H. C. J.

CHITTY J.
1895
May 3.

In re SALT.
BROTHWOOD *v.* KEELING.

[1894 S. 4293.]

Administration—Debts—Pecuniary Legatee—Marshalling Assets—Real Estate charged with Debts.

A testator, after directing payment of his funeral and testamentary expenses and debts, gave a legacy of 1500*l.* to his son S., and devised and bequeathed all his real and the residue of his personal estate upon trusts for sale and investment, to pay the income to his wife for life, and after her death to divide the estate among his children. The personal estate was insufficient to pay the legacy in full after satisfying the debts, funeral and testamentary expenses:—

Held, that S. was entitled to have the assets marshalled so as to stand in the place of creditors against the real estate to the extent to which the personal estate had been applied in the payment of debts and funeral and testamentary expenses.

In re Bate (43 Ch. D. 600), not followed.

ADJOURNED SUMMONS.

Samuel Salt, by his will dated December 12, 1891, after directing payment of his funeral and testamentary expenses and debts as soon as possible after his decease, gave to his son Samuel the sum of 1500*l.* in addition to his share of the estate, and devised and bequeathed all his real and the residue of his personal estate to his wife Sarah and the plaintiff Joseph Brothwood, upon trust to realize and convert the same into money, and invest the net proceeds upon such securities as trustees might from time to time invest trust moneys, and to pay the income to his wife during her life, and after her death to call in such investments, and convert his whole estate into money and divide the same unto and equally between his five children (by name) and the issue of a deceased daughter; the testator then appointed his wife and the plaintiff executrix and executor of his will.

The testator died on December 15, 1891, and his widow died on December 10, 1893. The realization of the estate did not take place till after the death of the widow, when it was

CHITTY J. 1895 *In re* SALT. BROTHWOOD *v.* KEELING.

discovered that the personal estate was at the testator's death, and then, insufficient to pay all the debts, funeral and testamentary expenses. The real estate after payment off of a mortgage amounted to about 8000*l.*

The plaintiff, as surviving executor, now applied by originating summons for the determination of various questions arising out of the administration of the estate; and upon the hearing of the summons his Lordship decided, that the 1500*l.* legacy to the testator's son Samuel was not charged on the real estate; the question was then argued whether the legatee was entitled to have the estate marshalled, so as to throw the whole of the debts, funeral and testamentary expenses upon the real estate.

Seddon, for the plaintiff.

Levett, Q.C., and *O. L. Clare* for the legatee. The rule laid down in Seton on Judgments, 4th ed. pp. 989 and 990, that pecuniary legatees are entitled to marshal against real estate charged with debts, is correct, notwithstanding the decision of *In re Bate.* (1) In *Re Stokes* (2) Stirling J. discussed *In re Bate* (1), and did not follow it. *Re Stokes* is very similar to the present case, and we ask you to follow that in preference to *In re Bate.* (1)

Byrne, Q.C., *Dunham*, and *Wadsworth*, contra. The rule laid down in *In re Bate* (1) is the correct one, and consequently this legatee is not entitled to have the assets marshalled.

CHITTY J. The reasoning of Stirling J. in *Re Stokes* (2) appears to me to be unanswerable; and in my opinion this legatee is entitled to have the estate marshalled so as to throw the whole of the debts, funeral and testamentary expenses upon the real estate.

I need not go through this will further than to say that under it the debts are charged upon the real estate, with the result that the creditors have two funds available for payment of their debts, whereas the legatee has only one, and he is therefore entitled to marshal the assets. Stirling J. in *Re Stokes* (2) seems to have carefully considered all the authorities; and I shall

(1) 43 Ch. D. 600. (2) 67 L. T. (N.S.) 223.

follow that case in preference to *In re Bate* (1), the reasoning in the former case being, in my opinion, entirely in accordance with the well-known doctrine of equity as to marshalling.

Solicitors: *Charles Robinson & Co., for A. G. Hooper, Dudley; Harman, Ward & Collier.*

W. C. D.

TURNER *v.* GREEN.

[1894 T. 2113.]

Specific Performance—Defence to—Agreement for Compromise—Silence as to Material Fact.

Shortly before an interview between the plaintiff's solicitor F., the defendant, and his solicitors, to arrange for the compromise of an action, F. received a telegram informing him of the result of certain proceedings in the action favourable to the defendant, but did not disclose his information before the terms of compromise were agreed. The defendant claimed that the agreement was no longer binding, on the ground that a material fact had been suppressed:—

Held, that there being no obligation on F. to disclose all he knew, the defendant was bound by the terms of the settlement.

Mere silence as regards a material fact, which the one party is not bound to disclose to the other, is not a ground for rescission, or a defence to specific performance.

Ellard v. *Lord Llandaff* (1 Ball & B. 241; 12 R. R. 22) considered.

Patent defects

ADJOURNED SUMMONS.

The object of this application was to enforce the terms of an agreement for the compromise of the action, which the defendant alleged was not binding upon him on the ground of the suppression of a material fact.

The action was commenced in November, 1894, and by it the plaintiff claimed an account from the defendant as his alleged manager, and a declaration that, under the circumstances, the defendant was not entitled to exercise a certain option of purchase.

Shortly after appearance had been entered, the plaintiff took out a summons for account, under Rules of the Supreme Court, 1883, Order XV.: this summons was adjourned from time to time

(1) 43 Ch. D. 600.

CHITTY J. 1895 TURNER v. GREEN.

for the purpose of evidence being filed in support of and in opposition thereto, the defendant contending that there was a preliminary question to be tried.

On January 11, 1895, the summons came on for hearing before the chief clerk, who after going fully into the evidence was of opinion that the summons ought to be dismissed with costs; the summons was then adjourned to the judge at the instance of the plaintiff. At 3.30 P.M. in the afternoon of the same day, Fowler, a member of the firm of solicitors acting for the plaintiff, arranged the terms of a compromise of the action with the defendant and his country solicitors at Portsmouth. It appeared that when this compromise was entered into and signed by the defendant, the result of the proceedings before the chief clerk had been telegraphed to Fowler, but was not known either to the defendant or to his solicitors. The information contained in the telegram was not communicated by Fowler to the defendant or his solicitors at this interview.

The defendant alleged, that had he known the result of the proceedings before the chief clerk he would not have agreed to the compromise, and declined to be bound by the agreement.

On January 15, 1895, the present summons was taken out on behalf of the plaintiff for a stay of proceedings in the action on the terms of the compromise agreed to on January 11; and, by consent, this application was treated, for the purposes of argument, as though it were an action for specific performance of the agreement.

Evidence was filed on both sides as to what took place at the meeting, and as to the alleged knowledge of the defendant's solicitor of the proceedings in London, the result of which is stated in the judgment.

Butcher, for the defendant. The onus is on the defendant to shew why this agreement, which I admit was signed by him, should not be enforced. Fowler was guilty of what may be called "fraudulent silence": he was informed that the summons for an account had been dismissed with costs, and yet he said nothing about this most material fact; such silence, though it may not amount to actual fraud, may yet constitute such

unfairness as to stay the hand of the Court, and be a good defence to an action for specific performance: *Ellard* v. *Lord Llandaff* (1); Fry on Specific Performance, 3rd ed. p. 333. The defendant would never have agreed to the terms he did consent to had he known of this material fact. The Court will not enforce a contract made under a mistake: Kerr on Fraud, 1st ed. p. 343. It is against all equity for a man to take advantage of another's mistake: *Manser* v. *Back.* (2)

[CHITTY J. *Ellard* v. *Lord Llandaff* (1) seems to be questioned by Sir Edward Fry at p. 333, par. 717.]

No adverse comment has ever been made on that decision in any other reported case, so far as I have been able to ascertain. I ask the Court in the exercise of its discretion not to grant specific performance of this agreement.

Macnaghten, for the plaintiff. *Ellard* v. *Lord Llandaff* (1) is inconsistent with all the other authorities which establish that mere silence without fraud is insufficient. The plaintiff's solicitor was under no obligation to disclose all he knew when arranging this compromise. The obligation to disclose is the essential part of any defence to specific performance, and the facts of this case fall far short of what is required: *Walters* v. *Morgan* (3); *Brownlie* v. *Campbell* (4); *Smith* v. *Hughes.* (5)

Butcher, in reply. The cases relied on by the plaintiff do not touch the principle involved here; the Court will not encourage sharp practice; Fowler's conduct in keeping this material fact to himself was not in accordance with the usual practice among solicitors of high standing. It is not necessary for me to base my case upon fraud.

CHITTY J. (after stating the facts and reviewing the evidence, continued):—My opinion on the facts is, that the defendant's country solicitor did not know that the summons for account had been heard that day before the chief clerk, and my judgment will proceed on that footing—a footing favourable to the defendant. Then I come to the real question in this case, which

(1) 1 Ball & B. 241; 12 R. R. 22.
(2) 6 Hare, 443.
(3) 3 D. F. & J. 718.
(4) 5 App. Cas. 925, 950.
(5) L. R. 6 Q. B. 597.

CHITTY J. 1895 TURNER v. GREEN.

is, Ought the Court to decline to enforce this agreement because Fowler, being aware of the circumstance that the chief clerk had expressed his opinion—which however did not amount to a decision—did not disclose that circumstance to the defendant and his solicitors when the terms of this compromise were being settled?

The question thus raised is not one of fraud, but one as to the doctrine of the Court in granting relief against a claim for specific performance, where the Court has a discretion; but that is, of course, a judicial discretion, which cannot be exercised arbitrarily, but only according to settled principles laid down for it by the authorities. I will take the proposition laid down by Sir Edward Fry in his book (3rd ed. p. 325, par. 705) as a good exposition of the law; there he says: "Mere silence as regards a material fact which the one party is not under an obligation to disclose to the other cannot be a ground for rescission or a defence to specific performance."

It cannot be contended that Fowler was under any obligation to disclose the result of the telegram; therefore Mr. Butcher, who argued his case with skill and ingenuity, was driven to say that it was a shabby trick on Fowler's part not to disclose the information he had received, and that such conduct was not consistent with the usual practice of solicitors of high standing in their dealings with one another, who would ordinarily have disclosed any such circumstance; therefore, he argued that specific performance ought to be refused, because the course adopted in this case would be generally condemned by high-minded men. I find myself unable to act judicially on any such ground. Had there been any overreaching by Fowler, or any misleading conversation with reference to the proceedings in London before the chief clerk, at the time the terms of the compromise were settled, a very different case might have been presented on behalf of the defendant, and in such a case an obligation might have arisen binding Fowler at law or in equity to make a disclosure of all he knew; but I am satisfied on the evidence that no conversation on the subject took place.

The distinction between suppression of a fact and mere silence is a very old one, and is to be found in a passage from Cicero

(De Off. lib. iii. c 13), which is cited by Sir Edward Fry in his book (3rd ed. p. 329): "Aliud est celare, aliud tacere; neque enim id est celare quicquid reticeas." The obligation to speak is at the root of this proposition.

In *Walters* v. *Morgan* (1), where specific performance of an agreement for a lease was being sought, Campbell L.C. said (2): "There being no fiduciary relation between vendor and purchaser in the negotiation, the purchaser is not bound to disclose any fact exclusively within his knowledge which might reasonably be expected to influence the price of the subject to be sold. Simple reticence does not amount to legal fraud, however it may be viewed by moralists. But a single word, or (I may add) a nod or a wink, or a shake of the head, or a smile from the purchaser intended to induce the vendor to believe the existence of a non-existing fact, which might influence the price of the subject to be sold, would be sufficient ground for a Court of Equity to refuse a decree for a specific performance of the agreement." That is a correct statement of the law, and one which, it appears to me, is not to be confined to the sale of lands or goods, but is of general application, except perhaps in the case of contracts requiring uberrima fides, which involve a duty to make full disclosure.

So far then, without referring to the other authorities which have been mentioned at the bar, the defendant has not made out his defence on this summons. But there is a case in Ireland (cited by Mr. Butcher), which no doubt is in point—the case of *Ellard* v. *Lord Llandaff*. (3) In that case specific performance was asked "of an agreement for a lease, in consideration of the surrender of an old lease." The old lease depended upon a single life, and that life was, as was known to the plaintiff, but not to the defendant, on the point of expiring when the agreement was entered into; and in those circumstances Lord Manners refused to grant specific performance, and, in his judgment, he certainly makes it a distinct ground. But there was another ground fatal to the plaintiff's case, which was, that the contract for a lease was void under the power which had to be exercised

(1) 3 D. F. & J. 718. (2) 3 D. F. & J. 723.
(3) 1 Ball & B. 241, 250; 12 R. R. 22, 27.

CHITTY J. 1895 TURNER v. GREEN.

for its performance, and, inasmuch as that would embarrass the remainderman, though it would not bind him, the Lord Chancellor of Ireland refused also on that ground to grant specific performance. I may say, with regard to that latter ground, that it could not be questioned in the present day, that it was quite sufficient for the decision of the case; but, as I have said, Lord Manners makes the non-disclosure of the life being in extremis the ground for refusing specific performance. He quotes Lord Hardwicke in *Buxton* v. *Lister* (1), "that nothing is more established in this Court, than that every agreement of this kind ought to be certain, fair, and just in all its parts. If any of those ingredients are wanting in the case, this Court will not decree a specific performance." Then Lord Manners is reported to have proceeded thus: "All the material facts must be known to both parties; and is it not against all principles of Equity, that one party, knowing a material ingredient in an agreement, shall be permitted to suppress it, and still call for a specific performance?" The term used by the Lord Chancellor is "suppress." The Lord Chancellor, whose language I must consider to be properly reported, must have had in his mind that it was the lessee's duty to disclose. It is upon that ground that he expresses his opinion upon this point. If I may be at liberty to say so, I think *Ellard* v. *Lord Llandaff* (2) was a trying case for any judge, and a case in which possibly a temptation might arise to strain the law. I need scarcely add that if that life had dropped, there would be no contract at all, according to the decision of the Court of Exchequer in *Strickland* v. *Turner*. (3) I think, having regard to subsequent authorities, I must take that as a decision, that where there is a duty—or referring back to Sir Edward Fry's proposition slightly varied—that where there is an obligation to disclose, the non-disclosure is a defence to a specific performance action. I have not been able to discover—nor have the counsel engaged before me, who seem to have searched the authorities on the matter—any special mention of *Ellard* v. *Lord Llandaff* (2), either approving or disapproving it as it stands reported. But the learned editor of Fry on Specific Performance

(1) 3 Atk. 383.
(2) 1 Ball & B. 241; 12 R. R. 22.
(3) 7 Ex. 208.

does apparently question the authority of the case at p. 333 of the 3rd ed., speaking of it in this way: "The case of *Ellard* v. *Lord Llandaff* (1), if it is to be supported on the ground of the silence of the lessee as to the fact that one of the lives in the surrendered lease was, at the time of signing the contract, in extremis, rests upon this principle: and was so put by Lord Manners in deciding it." "It is possible that silence which would not constitute fraud may yet constitute such unfairness in a contract as to stay the hand of the Court." If the case is looked upon as one of great hardship upon the defendant in its very special circumstances, and as one which presented a contract which ought not, on that ground, to be enforced, then the case would stand well upon the ground suggested by Sir Edward Fry. But in my opinion, the facts of this case fall far short of what is required, even making the assumption I have made in favour of the defendant; and I come to the conclusion that Mr. Fowler's silence, in the circumstances of this case, is not sufficient ground for my refusing specific performance; and I shall make the order accordingly.

Solicitors: *Mear & Fowler; Emanuel, Round & Nathan, for Ivens & Phelps, Portsmouth.*

(1) 1 Ball. & B. 241; 12 R. R. 22.

W. C. D.

CHITTY J.

1895

May 16.

In re CLAYTON AND BARCLAY'S CONTRACT.

[1894 C. 4203.]

Vendor and Purchaser—Undischarged Bankrupt—After-acquired Property—Leaseholds—Intervention of Trustee—Property vesting in Trustee—Disclaimer—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 44, 54, 55, 168.

The proposition laid down in *Cohen* v. *Mitchell* (25 Q. B. D. 262), that until the trustee intervenes all transactions by a bankrupt after his bankruptcy with any person dealing with him bonâ fide and for value, in respect of his after-acquired property, are valid against the trustee, though not intended to apply to freeholds, as laid down by *In re New Land Development Association and Gray* ([1892] 2 Ch. 138), must be taken to apply to leaseholds.

Leases for terms of years and subject to onerous covenants were granted to an undischarged bankrupt, and were subsequently demised by him by way of mortgage, without any intervention by his trustee in bankruptcy; a purchaser from the mortgagees objected that no title could be made:—

Held, that until the trustee intervened the bankrupt could deal with his after-acquired leaseholds, and that the purchaser could be forced to accept the title.

Whether s. 55 of the Bankruptcy Act, 1883, enables a trustee to disclaim after-acquired leaseholds, *quære*.

Adjourned Summons under the Vendor and Purchaser Act, 1874, raising the question whether dealings by an undischarged bankrupt with after-acquired leaseholds were binding as against his trustee in bankruptcy.

The facts, so far as material for the purposes of this report, were as follows:—

In October, 1885, William Randall Lacey was adjudicated bankrupt in the Chelmsford County Court, the trustee in the bankruptcy being the official receiver of the Court, Cecil Mercer.

In December, 1891, two leases for ninety-nine years, at a ground-rent of 8*l.* per annum for each house, were granted to Lacey of two houses at Chiswick, Lacey being at the time an undischarged bankrupt. The leases contained the usual lessee's covenants.

In November, 1892, Lacey mortgaged these two houses to the plaintiffs, by a demise for the residue of the term less ten days, to secure 580*l.* The mortgage contained the usual declaration by

Lacey that he would stand possessed of the nominal reversion of ten days in trust for the plaintiffs, to be disposed of as they should direct.

In May, 1894, the plaintiffs contracted to sell these houses to the defendant, and proposed to assign them to him under their power of sale as mortgagees; but the defendant, having discovered the fact of Lacey's previous bankruptcy and that he was still an undischarged bankrupt, required the concurrence of Cecil Mercer, the trustee, and declined to complete the purchase unless the transaction was carried through and the assignment framed on the footing of the purchase-money being paid to Cecil Mercer, selling under his power as trustee in the Chelmsford bankruptcy.

The plaintiffs, on the other hand, contended that they had a good title to sell and assign without any such concurrence, though they offered to make Cecil Mercer a party to the deed to signify his consent to the transaction. The defendant not being satisfied with this proposal, the plaintiffs took out the present summons, asking for a declaration that they had a good title to assign the said houses, and that the defendant might be ordered to complete the purchase.

No disclaimer in respect of the said leasehold houses had ever been executed by Cecil Mercer.

F. Cooper Willis, for the plaintiffs, the vendors. The doctrine of *Cohen* v. *Mitchell* (1) applies to a chattel interest like leaseholds, and, therefore, after-acquired leaseholds do not vest in the trustee until he intervenes; and the undischarged bankrupt can, until the interference of the trustee, dispose of his leaseholds just as freely as he can of his chattels. *Cohen* v. *Mitchell* (1) has been further explained in *Ex parte Beardmore.* (2) The exception to the proposition in *Cohen* v. *Mitchell* (1) made in favour of freeholds by the decision of *In re New Land Development Association and Gray* (3) does not apply to leaseholds. The trustee makes no claim here and has not intervened, though he is willing to testify his consent by being made a party to the assignment, and the vendors can make a good title.

(1) 25 Q. B. D. 262. (2) [1894] 2 Q. B. 393.
(3) [1892] 2 Ch. 138.

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T. H. Carson, for the defendant, the purchaser. The mortgagees, the vendors, cannot make a title, because they never got a title themselves in the first instance from Lacey: the moment the leases were granted to Lacey, the term and interest so granted, passed eo instanti to his trustee, because he was then an undischarged bankrupt. All the reasons given in *In re New Land Development Association and Gray* (1) apply with equal force to leaseholds, which, equally with freeholds, pass by conveyance and not by delivery. By s. 44 the "property" of the bankrupt divisible among his creditors includes all such property as belongs to him at the commencement of his bankruptcy or is acquired by him before his discharge; "property" by s. 168 includes leaseholds, and by s. 54 the property of the bankrupt vests in his trustee.

[CHITTY J. If the trustee were to disclaim now, the purchaser would be safe.]

The trustee cannot now disclaim: it is too late. By s. 55, sub-s. 1, disclaimer should be made within three months, and, as this was a valuable lease, probably leave to disclaim would not have been given: *Ex parte East and West India Dock Co.* (2) To make the trustee a party to consent to the sale, without paying any of the purchase-money to him, would be useless; his consent, under such circumstances, would be a breach of trust.

Then, this title is too doubtful to be forced on a purchaser: that alone is a sufficient defence to this application.

F. Cooper Willis, in reply. The trustee could disclaim if necessary; but disclaimer is not necessary: he is a proper party to the conveyance to shew that he does not claim any interest in this property, and that he has not intervened.

CHITTY J. At the time when the leases of December, 1891, were granted to Lacey he was an undischarged bankrupt. The leases are for terms of years, and subject to the usual onerous covenants. It is contended for the purchaser, that by virtue of the 44th section of the Bankruptcy Act, 1883, read in connection with the 54th and 168th sections of the same Act, the term and interest so granted to Lacey passed eo instanti to the trustee of

(1) [1892] 2 Ch. 138. (2) 17 Ch. D. 759.

the bankruptcy. On the other hand, it is argued for the vendor that the decision of the Court of Appeal in *Cohen* v. *Mitchell* (1) applies, and, consequently, that the property did not vest in the trustee in bankruptcy until he intervened. In *Cohen* v. *Mitchell* (2) the Court of Appeal, after deliberation, laid down the law in respect of after-acquired property of the bankrupt in these words: "Until the trustee intervenes, all transactions by a bankrupt after his bankruptcy with any person dealing with him bonâ fide and for value, in respect of his after-acquired property, whether with or without knowledge of the bankruptcy, are valid against the trustee." I had to consider in *Re New Land Development Association and Gray* (3) whether it was intended by the Court of Appeal to apply that proposition to real estate, and, for the reasons which I gave, I held that real estate was not within the view of the Court when it laid down that proposition; and it seems that what I thus held met with the approval of the Court of Appeal. The present case, however, is not one of real estate, and not a case in which freehold property has been acquired by the bankrupt before his discharge. It is a case of a chattel interest, subject (as I have stated) to onerous covenants. If the purchaser is right, the mortgage as here made by Lacey to the vendors conferred no title upon them. If, on the other hand, the proposition as enunciated by the Court of Appeal applies, then, it being clear that the trustee in bankruptcy had not intervened, and it being clear also that the trustee in bankruptcy has not since intervened, and does not desire now to intervene in any sense hostile to that transaction, the question is whether I ought to read another exception into the proposition laid down by the Court of Appeal—namely, the exception of a chattel interest in land.

Possibly some of the reasons that I gave for the exception of real estate might apply, but with diminished force, to the case of a lease for a term of years with covenants; but I have now to consider whether any such reasons would justify me in introducing this further limitation. It appears to me that I ought not to attempt to introduce any further limitation. The language

(1) 25 Q. B. D. 262. (2) 25 Q. B. D. 267.
(3) [1892] 2 Ch. 138.

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of the Court of Appeal in *Cohen* v. *Mitchell* (1) is large enough to include all property, and certainly large enough to include a chattel interest in land; and I think that I ought to consider myself bound, as I do, by the proposition that they laid down, and that this case falls within it.

I can see various difficulties which would arise in a case in which the proposition did not apply. I do not at the moment propose to express any definite opinion upon them, but I make this statement, that it is by no means clear that s. 55, the disclaimer section of the Bankruptcy Act, 1883, would apply to the case of an after-acquired lease. It is plain that there are some words in the section which would not apply, such, for instance, as the limitation in the 1st sub-section of s. 55 of the period of three months after the appointment of the trustee as the time for his disclaimer, and it would be a strange thing if the 55th section does not apply, that in regard to the after-acquired leasehold property the trustee should not be able to disclaim. I merely mention that without expressing any concluded opinion on the effect of that section, because there are other parts, particularly the proviso at the end of that sub-section, which might be read so as to include after-acquired property, and give the trustee still an opportunity of disclaiming within the time limited by that statute, as amended by the Act of 1890.

The result then is, that as the trustee had not intervened when the mortgage was made by Lacey to the vendors, they acquire a good title; it also appears that the trustee is ready to join in the assignment to the purchaser in such a manner as to shew that he consents to the transaction. That will put an end to any possible question in regard to the intervention of the trustee, and the deed of assignment may properly contain, if the purchaser desires it, some words to that effect.

Then the purchaser suggested that the title was too doubtful to be forced upon him; but this question is not a question of the construction of a private document, nor even a question of the construction of a doubtful Act of Parliament, because the Court of Appeal have had this question before them, and have deliberately laid down the law in the manner I have already

(1) 25 Q. B. D. 267.

stated; and I take it that, on a question of doubtful title, the Court does not give way to the suggestion of doubtful title when there is a decision of the Court of Appeal in favour of it.

In my opinion, therefore, the title is a good title, and one which the purchaser can be forced to accept.

Solicitors: *Beaumont & Son; Irvine, Hodges & Borrowman.*

W. C. D.

In re GREER. NAPPER *v.* FANSHAWE.

[1889 G. 1128.]

Garnishee Order—Money in the hands of the Sheriff—Judgment for Payment of Money into Court—Judgment for Payment of Money to a Person—Distinction in Modes of enforcing the Judgments—Costs—"Debt or Liability"—Rules of Supreme Court, 1883, *Order* XLII., *rr.* 3, 4; *Order* XLV., *r.* 1—*Bankruptcy Act*, 1890 (53 *&* 54 *Vict. c.* 71), *s.* 11, *sub-s.* 2—*Bankruptcy Act*, 1883 (46 *&* 47 *Vict. c.* 52), *s.* 30, *sub-s.* 1.

Where a sum of money has been ordered to be paid into court, a garnishee order cannot be made attaching a debt to answer the sum so ordered to be paid in.

Judgments or orders for payment of money into court are not within Order XLV., r. 1.

Apart from sub-s. 2 of s. 11 of the Bankruptcy Act, 1890, money in the hands of the sheriff can be attached by a garnishee order. The effect of the sub-section is to place a temporary stop on the money in the hands of the sheriff. The right of the execution creditor to the money is not a contingent right: it is a vested right, liable to be divested in the event of bankruptcy supervening within the fourteen days mentioned in the sub-section.

Costs incurred in an action relating to a fraudulent breach of trust are not a "debt or liability" within s. 30, sub-s. 1, of the Bankruptcy Act, 1883.

THIS was an application to make absolute a garnishee order nisi.

The order nisi attached money in the hands of the sheriff under an execution levied by him on behalf of the defendant. The money was attached to answer, first, a sum of money which the defendant had been ordered to pay into court in respect of a breach of trust; and, secondly, a sum of 119*l.* which he had been ordered to pay to the applicant for costs incurred in the action relating to such breach of trust.

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The order nisi was made within fourteen days of the completed execution.

In April, 1891, the defendant was adjudicated bankrupt; and in February, 1894, an order was made approving of a composition and annulling the bankruptcy.

The questions were—(1.) Whether a garnishee order could be made attaching a debt to answer a sum of money ordered to be paid into court; (2.) Whether money in the hands of the sheriff could be attached by a garnishee order; and (3.) Whether the defendant had been released from the payment of the 119*l.* by the composition having regard to s. 30, sub-s. 1, of the Bankruptcy Act, 1883.

E. Cooper Willis, Q.C., for the applicant. We have a right to garnish the money in the hands of the sheriff as to both sums.

The sheriff is a garnishee within Order XLV., r. 1. An action will lie against him for money had and received: *Cockram* v. *Welbye* (1); *Speake* v. *Richards* (2); *Morland* v. *Pellatt* (3); and money may be attached in his hands: *Murray* v. *Simpson.* (4)

The position of the sheriff as garnishee was recognised in *Dallow* v. *Garrold.* (5)

Moneys in the hands of a receiver may be attached: *In re Cowan's Estate.* (6)

[He also referred to *Chatterton* v. *Watney.* (7)]

The breach of trust was fraudulent.

Byrne, Q.C., T. Willes Chitty, and *Schiller,* for the defendant. We submit that a sum of money which has been ordered to be paid into court is not the subject of garnishee proceedings. By rule 4 of Order XLII. a judgment for the payment of money into court may be enforced by writ of sequestration, or, in certain cases, by attachment; and rule 3 of the same order provides the modes by which payment of money to a person may be enforced. The distinction between the two rules is recognised by the Court of Appeal in *Lady De La Pole* v. *Dick.* (8)

(1) 2 Show. 79.
(2) 2 Show. 289.
(3) 8 B. & C. 722.
(4) 8 Ir. C. L. Rep. (App.) xlv.
(5) 13 Q. B. D. 543; 14 Q. B. D. 543.
(6) 14 Ch. D. 638.
(7) 16 Ch. D. 378.
(8) 29 Ch. D. 351.

Irrespective of the Bankruptcy Act, 1890, the money in the hands of the sheriff is, no doubt, a debt due from him, but until the fourteen days referred to in s. 11, sub-s. 2, of that Act have expired it does not become a "debt accruing" within Order XLV., r. 1. The debt must be an absolute debt, and not a mere possibility of a debt: *Webb* v. *Stenton* (1); *Howell* v. *Metropolitan District Ry. Co.* (2) If bankruptcy supervened during the fourteen days, it would never become a debt.

The breach of trust was not fraudulent.

Cooper Willis, Q.C., in reply. *Webb* v. *Stenton* (1) and *Howell* v. *Metropolitan District Ry. Co.* (2) have no application to the present case, as in neither of these cases was there money in hand.

As to the other point, I submit that a judgment for payment of money into Court is a judgment for the recovery of money within Order XLV., r. 1. The sum which the defendant has been ordered to pay for costs is a "debt or liability" within sub-s. 1 of s. 30 of the Bankruptcy Act, 1883, from which he has not been released by the composition.

Cur. adv. vult.

May 21. CHITTY J. Very many points were argued on the hearing of this application to make the garnishee order absolute. But, on consideration, it appears to me that the case falls to be decided on a few comparatively simple grounds.

The order nisi attached money in the hands of the sheriff to answer, first, a sum of money which the defendant Fanshawe had been ordered to pay into court, and, secondly, a sum which he had been ordered to pay to the applicant for costs which have been taxed at 119*l.*

The first question is whether a garnishee order can be made attaching a debt to answer a sum of money ordered to be paid into court. This depends on Orders XLII. and XLV. of the Rules of Court. By rule 4 of Order XLII., a judgment which includes an order for the payment of money into court may be enforced by writ of sequestration or, in cases in which attachment is authorized by law, by attachment. Attachment here means

(1) 11 Q. B. D. 518. (2) 19 Ch. D. 508.

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attachment of the person. By rule 3, a judgment for the recovery by or payment to any person of money may be enforced by any of the means by which a judgment or decree for the payment of money of any court whose jurisdiction is transferred by the principal Act might have been enforced at the time of the passing thereof. A judgment or order for payment of money into court is thus clearly distinguished from a judgment or order for the recovery by or payment of any money to a person, and different modes of enforcing payment are provided. The distinction was maintained by the Court of Appeal in *Lady De La Pole* v. *Dick*. (1) Judgments for the recovery of money are final, and orders for payment of money are generally final; but judgments or orders for payment into court are generally not final: the money paid in may be paid for security only or for safety of the fund, and the person ordered to pay in not unfrequently is entitled to have some part of the money afterwards paid out to him: ordinary writs of execution are, therefore, not made applicable to orders for payment into court.

I now turn to Order XLV.—the order which relates to the attachment of debts. Rule 1 of that order provides that the Court or a judge may, upon the ex parte application of any person who has obtained a judgment or order for the recovery or payment of money, order that all debts owing or accruing from the garnishee shall be attached to answer the judgment or order. Thus far no distinction appears to be made between a judgment or order to pay to a person and a judgment or order to pay into court. But the rule goes on to provide that it may be ordered that the garnishee shall appear to shew cause "why he should not pay to the person who has obtained such judgment or order" the debt due from him, or so much thereof as may be sufficient to satisfy the judgment or order. This latter part of the rule governs the previous part, and shews unmistakably that judgments or orders for payment into court are not within the rule. Payment to the person who has obtained a judgment or order for payment to himself would be a satisfaction or part satisfaction, as the case may be, of such a judgment or order; payment to him would not only not be a satisfaction

(1) 29 Ch. D. 351.

of a judgment or order to pay into court, but would be inconsistent with the judgment or order. Take the case of a tenant for life of a trust fund obtaining an order against a trustee for payment of the fund into court; payment by the garnishee to the tenant for life would be in contravention of the order. Many other similar illustrations might readily be given. Other rules in Order XLV. point in the same direction as the first rule of the order. The result, in my opinion, is, that garnishee proceedings will not lie upon an order for payment of money into court. Such proceedings have now been in operation since the Common Law Procedure Act, 1854; and the applicant's counsel was not able to produce any authority for a garnishee order being founded on an order for payment into court. The first part of the application, therefore, fails. The objection which I have sustained does not apply to the sum ordered to be paid to the applicant for taxed costs.

The second question is, whether money in the hands of the sheriff can be attached by a garnishee order, it being admitted that, apart from the Bankruptcy Act, 1890, s. 11, sub-s. 2, it is capable of being attached. The result of the authorities, apart from that enactment, is that the sheriff holds the money to the use of the judgment creditor, and is liable to be sued in an action for money had and received. For that proposition it is sufficient to cite the case of *Morland* v. *Pellatt*. (1) By the enactment referred to the sheriff is directed to retain the money for fourteen days; and in the event of bankruptcy supervening the execution creditor loses his right to the money. The effect is to place a temporary embargo or stop on the money. If more technical language is requisite, I say the execution creditor's right to the money is vested, but liable to be divested. His right to the money is not a contingent right. In this case no bankruptcy supervened. The previous bankruptcy of the execution creditor Fanshawe had been annulled.

The remaining question is whether the defendant has been released from the payment of the 119*l.* by the composition. The effect of the composition under s. 23 of the Bankruptcy Act, 1883, is that the debts in respect of which the composition is

(1) 8 B. & C. 722.

CHITTY J. 1895 *In re* GREER. NAPPER *v.* FANSHAWE.

binding under the section include all debts and liabilities which would be released by an order of discharge in bankruptcy: *Flint* v. *Barnard.* (1) It was argued on behalf of the applicant that the sum ordered to be paid into court was a debt or liability incurred by means of the fraudulent breach of trust of the defendant, and was therefore within sub-s. 1 of s. 30 of the same Act; and further, that the 119*l.* ordered to be paid for costs incurred in the action relating to the breach of trust was also a debt or liability of a similar character. But the words of the section are plain, "debt or liability incurred by means of any fraudulent breach of trust."

Assuming that the money ordered to be paid into court did fall within that enactment, it appears to me that the costs, though incurred as consequential upon the breach of trust, are not within it. They are not a debt or liability incurred by means of the fraudulent breach of trust. I may refer, although the language of the enactment is different, to s. 4 of the Debtors Act, 1869, and state that an attachment never goes in respect of costs, but only in respect of the principal sum involved in the breach of trust. The practice of the Court upon this point is completely settled: *Middleton* v. *Chichester.* (2) The result therefore is that I can make no order on this application.

Solicitors: *C. T. Nicholls; H. H. Fanshawe.*

(1) 22 Q. B. D. 90. (2) L. R. 6 Ch. 152.

G. M.

HUNTER *v.* DOWLING.

NORTH, J.
1895
March 28;
April 2.

[1891 H. 3195.]

Partnership—Interest of Deceased Partner in Assets—Annual Account—Death of Partner before actual taking of Account—Negotiations pending for Purchase of Partnership Property by Railway Company—Price ascertained after Death—Goodwill.

Articles of partnership provided that an account should be taken on March 31 in each year of the assets and liabilities of the partnership, and of all dealings and transactions thereof during the then pending year, and a balance-sheet should be signed by the partners, and that, if any partner should die during the continuance of the partnership, the amount of his share and interest should be taken at the amount appearing as standing to his credit in the last annual balance-sheet which should have been signed previously to his death.

A partner died on April 10, 1891. At that time the partnership account for the year ending March 31, 1891, had not been taken. A railway company had, under their statutory powers, given notice to take part of the leasehold manufactory of the partnership, and had served on the partners a notice to treat. The partners had given a counter-notice, requiring the company to take the whole of the property. Negotiations as to the price to be paid had taken place.

On March 16, 1891, the partners sent a claim to the company for 22,470*l.*, which was made up of items for "leasehold interest," "plant," "goodwill," and "disturbance and removal." On April 8 the company offered 19,000*l.* in settlement of all claims; and on April 11 the solicitors of the partners wrote to the company's solicitors that their clients had instructed them to accept the offer of 19,000*l.* The letter mentioned the death of the partner. This arrangement was carried out by a formal agreement dated July 30, 1891.

At the trial of an action by the executor of the deceased partner against the surviving partners to ascertain the interest of the testator in the assets of the partnership, it was held ([1893] 1 Ch. 391) that the plaintiff was entitled to have the partnership accounts taken up to March 31, 1891, and to have the share of the testator ascertained by that account, and that the value of the leasehold factory as of that day should be included in the account. On taking the account the chief clerk apportioned the 19,000*l.* between the three items of the claim made by the

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firm other than the item for disturbance and removal in proportion to the amounts claimed for those items respectively :—

Held, that the plaintiff was entitled to have the amounts apportioned in respect of the leasehold interest and the plant brought into the account, but not the amount apportioned in respect of the goodwill.

SUMMONS by the defendants, asking that the chief clerk's certificate, dated January 8, 1895, of the result of an account taken by him, in pursuance of an order dated June 13, 1893, might be varied by disallowing the whole of a surcharge of 15,580*l.* 10*s.* brought in by the plaintiff, and by striking out the allowance by the chief clerk of that surcharge to the extent of 14,143*l.* 6*s.* 8*d.*

Edmund Dowling, E. S. Pinchin, E. A. Johnson, and C. E. Dowling entered into partnership as oil and colour merchants, under a deed dated March 31, 1884, which contained the following clauses :—

"15. On March 31 in each year during the continuance of the partnership, or as near thereto as conveniently may be, a general account shall be taken of the assets and liabilities of the partnership, and of all dealings and transactions of the partnership during the then preceding year, and of all matters and things usually comprehended in accounts of a like nature taken by persons engaged in a like business, and in taking such account a just valuation shall be made of all items requiring valuation, together with an estimate of all doubtful and bad debts; and in the general yearly account so to be taken there shall from time to time be made a balance-sheet, and the said balance-sheet shall be signed by all the partners in testimony of their approbation thereof, and the accounts to be so made and signed shall not afterwards be called in question, opened, or in any manner contravened after such yearly settlement as aforesaid."

"23. If any partner shall retire under the provisions hereinbefore contained, or shall die during the continuance of the partnership, the remaining or surviving partners shall (but subject in respect of a partner so dying to the power hereinbefore contained of bequeathing his share and interest in the partnership) accept and take, in the shares and proportions to which they shall at the time of such retirement or decease be interested in the profits of the partnership business, all the share

and interest of the partner so retiring or dying in the capital of the business and the share of the profits of the partner so retiring or dying, and the amount of the share and interest of the partner so retiring or dying shall be taken at the amount appearing as standing to his credit in the last annual balance-sheet which shall have been signed previously to the date of such retirement or death, addition being made thereto on account of the proportion of profits which shall have accrued due to such partner since the last annual account, according to the average amount of profits during the three years preceding the last annual account, if so many years shall have elapsed, and if so many years shall not have elapsed, according to the average amount of profits during so many years as shall have elapsed."

As a matter of convenience the annual account was not usually taken until towards the end of April in each year, though it was then taken for the year ending the previous March 31. The accounts were so taken down to April, 1890.

Among the assets of the partnership were some leasehold premises at Hammersmith, and a leasehold manufactory at Cable Street, St. George's-in-the-East, the lease of which was granted to the partners in June, 1889.

In April, 1890, a general account and balance-sheet was made for the year ending March 31, 1890; but in this account, although a value was placed on the Hammersmith premises, no value was placed on the Cable Street premises. In none of the annual balance-sheets had any value been entered for the good-will of the business.

On June 16, 1890, the London and Blackwall Railway Company, acting under their statutory powers, served on the partners a notice that they required to take a part of the Cable Street premises, and that the company were willing to treat with the partners for the purchase of their interest in that portion of those premises.

On August 7, 1890, the partners served on the company, under s. 92 of the Lands Clauses Consolidation Act, 1845, a counter-notice, requiring the company to purchase their interest in the whole of the Cable Street premises.

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A correspondence then took place between the solicitors of the partners and the solicitors of the company.

Ultimately, on March 16, 1891, the solicitors of the partners wrote to the solicitors of the company:—

"We have now the pleasure of forwarding to you (entirely without prejudice) the revised items of claim, viz.:

	£	s.	d.
(1.) Leasehold interest . . .	5000	0	0
(2.) Plant	7123	2	0
(3.) Goodwill	6056	18	10
(4.) Disturbance and removal . .	2250	0	0
	20,430	0	10
10 per cent. .	2043	0	1
	22,473	0	11

"As regards (1.) we understand from the surveyors that this amount can be substantiated, and that, taken on the basis of area of warehouse room, it is below the price already paid by the company in other cases.

"Are you prepared to offer 22,000*l.* in settlement?"

In reply to this letter the solicitors of the company wrote offering 18,000*l.* "in settlement of all claims," and added, "it is usual to allow 10 per cent. on the value of property, which in this case is limited to the value of the lease, consequently your claim in this respect has been made in error."

Further correspondence took place, and on April 8, 1891, the company's solicitors wrote to the solicitors of the partners: "We are now instructed to agree this claim for the leasehold interest, goodwill, plant, machinery, &c., and removal, at the sum of 19,000*l.*, which includes all claims."

On April 10, 1891, Johnson, one of the partners, suddenly died.

On April 11, 1891, the solicitors of the partners wrote to the company's solicitors: "We have seen our clients, and taken their instructions to assent to the settlement of their claim at 19,000*l.* upon the terms of your letter of the 8th inst." This

letter mentioned the sudden death of Johnson on the previous day.

On July 30, 1891, an agreement was entered into between the three surviving partners and the secretary of the company, on behalf of the company, by which it was agreed that the partners should sell to the company, and that the company should purchase, for the sum of 19,000*l.*, the leasehold premises in Cable Street, "together with all machinery, plant, fixtures, and fittings," for the estate and interest of the vendors under their lease. And it was further agreed "that the said purchase-money shall be received and taken as including compensation for all damage or injury which may be sustained by the vendors in respect of loss of trade and goodwill, expenses of removal, and for any other damage or injury whatsoever sustained by reason of severance, or otherwise by reason of the exercise of the powers contained in or the execution of the works authorised by" the company's special Acts, or any or either of them. This agreement was carried out, and the purchase-money was paid by the company to the vendors.

No account or balance-sheet for the year ending March 31, 1891, had been taken before Johnson's death.

The plaintiff, who was Johnson's executor, brought this action against the surviving partners, claiming to be entitled to an account of the partnership dealings down to March 31, 1891; and to have Johnson's share in the partnership assets ascertained, including in those assets the 19,000*l.* purchase-money paid by the railway company.

The action was tried by Romer J. (1)

By the judgment, dated December 17, 1892, it was declared that an account ought to be taken of the dealings and transactions of the partnership between the defendants and Johnson down to March 31, 1891, and that in taking that account the leasehold premises in Cable Street ought to be valued as of that date. Liberty to apply in chambers with reference to taking the account was reserved. This judgment was affirmed by the Court of Appeal. (2)

In pursuance of this liberty an order was by consent made on

(1) Vide [1893] 1 Ch. 391. (2) [1893] 3 Ch. 212.

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June 13, 1893, for taking the account down to March 31, 1891, from the foot of the account which was taken by the members of the late partnership down to March 31, 1890. Under this order the defendants carried in an account of the dealings and transactions of the late partnership down to March 31, 1891. This account stated the value of the leasehold premises in Cable Street to be 100*l.*, and the value of the plant, fixtures, &c., there to be 3000*l.*, this being the value which had been stated for the plant, &c., in several previous annual balance-sheets. No value was set down for the goodwill of the business.

The plaintiff carried in a surcharge amounting to 15,580*l.* 10*s.*, which was made up in this way. He claimed to have the value of the leasehold premises increased by 5400*l.*, and the value of the plant, fixtures, &c., increased by 4123*l.* 2*s.* He also claimed that the sum of 6056*l.* 18*s.* 10*d.* should be brought into the account as the value of the goodwill of the business.

The chief clerk allowed the surcharge to the extent in the whole of 14,143*l.* 6*s.* 8*d.*—namely, 4904*l.* in respect of the value of the leasehold premises; 3744*l.* 6*s.* 8*d.* in respect of the plant, fixtures, &c.; and 5495*l.* in respect of the value of the goodwill.

Cozens-Hardy, Q.C., and *J. M. Stone*, for the summons. The goodwill could not properly be valued as an asset in the yearly balance-sheets: *Steuart* v. *Gladstone*. (1) The account has been made out in exactly the same way as it was during the life of Johnson. The sum of 100*l.* was inserted as the value of the leasehold premises, because Romer J., in his judgment at the trial, said that some value ought to be put upon them. They had never been valued before. There was no concluded agreement with the railway company until July 30, and there is no justification for inserting in the balance-sheet as of March 31 a value which was based upon an agreement which was entered into four months afterwards. The Court should not be wise after the event. There was no reason for departing from the mode in which the account had always been made out.

Again, the railway company had no power to purchase the plant or the fixtures, and there was no ground for valuing them

(1) 10 Ch. D. 626.

on a new principle. The contract between the company and the firm, which was constituted by the notice to treat and the counter-notice, did not comprise the plant and fixtures.

A valuation under the Lands Clauses Consolidation Act is not made on the same principle as a valuation between partners: *Stebbing* v. *Metropolitan Board of Works.* (1)

Swinfen Eady, Q.C., and *Eve*, for the plaintiff. The finding of the chief clerk is right. The defendants, in their correspondence with the railway company, insisted that the property was worth so much, and then, when they had obtained the money from the company, they turned and endeavoured to minimize the value, in order to deprive their deceased partner's estate of a share in the money.

A notice to treat given by a railway company, coupled with an agreement as to the price to be paid for the property, constitutes a contract which can be enforced against the company: *Harding* v. *Metropolitan Ry. Co.* (2)

It has been argued that the contract was only to purchase the leasehold interest, and that the company were under no legal obligation to purchase the fixtures and plant. But they were bound, if required to do so, to take the whole factory, and that must mean everything which was in it and which was used for the purposes of the business. It was immaterial whether as between landlord and tenant the tenant could remove the fixtures: *Gibson* v. *Hammersmith Ry. Co.* (3) The company were bound to take the factory as it stood, though not, of course, the stock-in-trade or loose tools. The company, being under this obligation, made on April 8 an offer of 19,000*l.*, which was actually accepted on April 11. On what principle was the estate of the deceased partner not to share in every part of this sum? If the contract had been actually completed by acceptance of the offer on April 8, it is plain that the 19,000*l.* must have appeared in the balance-sheet as part of the assets of the partnership, and the death of a partner can make no difference in this respect.

As to the goodwill, in an ordinary case it would not appear in

(1) L. R. 6 Q. B. 37, 45. (2) L. R. 7 Ch. 154.
(3) 11 W. R. 299.

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the balance-sheet of a partnership because it has not any realizable value, and that was so in *Steuart* v. *Gladstone*. (1) In the present case the goodwill had a realizable value; there was an intention to turn it into money, and in substance a contract to sell it. Whatever the subject-matter of the sale was, there was an intention before the death of Johnson to sell it to the railway company. It was not a sale of the goodwill of the surviving partners after his death. There is no reason why the value of the property should not be ascertained by the light of events subsequent to Johnson's death.

In substance the company gave the 19,000*l.* for the leasehold premises; the goodwill was not transferred to the company. The vendors could after the sale carry on the business just as they did before, though the goodwill attached to the premises purchased by the company ceased to exist.

J. M. Stone, in reply. There was no completed contract with the company before Johnson's death.

The sum paid for the goodwill was compensation for the loss of future profits, in which the deceased partner could have no interest.

NORTH J. In my opinion the chief clerk was right in allowing the value of the leasehold interest and of the plant and fixtures, but wrong in allowing the value of the goodwill. [His Lordship stated the facts and referred to the correspondence, and continued:—]

Then the question is, what was the position of the parties on March 31 and April 10, 1891? It has been argued that there was no agreement binding the company until the agreement of July 30. It might as well have been said that there was no agreement whatever binding the company; because there is no evidence that the document which the secretary signed was signed by the authority of the company, any more than there is evidence that express instructions were given on behalf of the railway company to the solicitors to do what they did in March and April. But that seems to me immaterial. The question is, what was the value of the subject of the negotiations at the end of March and in April?

(1) 10 Ch. D. 626.

It is quite true they might have been broken off. No formal contract having been signed, it was possible that a difficulty might arise in carrying them out. But the negotiations could not have gone off altogether, because the firm were in a position to compel the company to purchase the property comprised in the counter-notice, to take all proper steps for ascertaining the price, and to pay the price when it had been ascertained. But, although there was then no formal agreement binding the company, the position of matters in April was this—it was quite clear that the parties had settled terms, and it was known what the company would pay, and what the firm would receive; and in estimating the value of the partnership property at the time, in my opinion that agreement was just as good as if a formal contract legally binding all parties had been actually executed; as was done some time afterwards, and the whole matter carried out. It is idle, therefore, to say that the valuation of the property in March, 1891, ought to have been what it had been in years gone by. In the accounts which had been taken in the past years, no value had been put upon the leasehold property in the balance-sheet, and the surviving partners wanted to do the same in the present case. But the Courts before whom the matter has already been pointed out that that would be wrong, and that a value must be put upon the leasehold property in making out the balance-sheet as of March 31, 1891. In the same way, I think a valuation must be made of the plant and fixtures. A value had been put upon them before, but they must now be valued with regard to the time at which the valuation had to be made. [His Lordship read clauses 15 and 23 of the deed of partnership, and continued:—]

If the account up to March 31, 1891, had been actually made out on that day, it is clear that it ought to have included a valuation of the interest of the firm in the property having regard to the price which had been practically agreed upon as that which was to be paid for it by the railway company, and it would be idle to suggest that any previous valuation, made at a time when no such offer was forthcoming, could be a guide. Proceeding upon that footing, the firm claimed 5000*l.* for the leasehold interest, with an addition of 10 per cent., raising the

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price to 5500*l.* They also claimed 7123*l.* as the price of the plant and fixtures—a sum which had been fixed on a previous occasion with a view to a sale to another company which had not been carried out. It seems to me that in assessing the price the chief clerk might well have adopted those figures which had been practically agreed upon as the values of the lease and the plant and fixtures.

It was contended that the company were not bound to take the plant and fixtures, but were only bound to take the lease. They were, however, bound to take the manufactory, which included the plant and fixtures as it stood. *Gibson* v. *Hammersmith Ry. Co.* (1) is exactly in point as to that. I may refer to what Kindersley V.-C. said at p. 301: "The word used in the 92nd section was 'manufactory,' and although, no doubt, it was not in work, it was in a condition to work, and, therefore, a manufactory was, in the popular and technical sense, the building as it stood, with the engines, &c. fixed to it—not merely the land and the bricks and mortar." So here, in my opinion, what the company were bound to take was, not merely the building itself, but also the plant and machinery in it. As to that, the chief clerk has allowed less than the amount of the claim; but the summons does not ask to vary the certificate in that respect, and I must leave it as it stands.

With respect to the goodwill, the matter seems to me to stand on a totally different footing. The interest of the deceased partner is to be ascertained with reference to the last annual balance-sheet, which is to be made out as such balance-sheets are usually made out, "a just valuation being made of all items requiring valuation." But in the previous years during which this partnership has been going on, and in which the partnership accounts had been regularly taken, the goodwill had never been introduced as an item in the balance-sheet, and, according to the decision of the Court of Appeal in *Steuart* v. *Gladstone* (2), upon articles very similar to those in the present case, it ought not to be introduced. I cannot see any distinction for this purpose between the articles in *Steuart* v. *Gladstone* (2) and the present articles. The Court of Appeal held that in taking an

(1) 11 W. R. 299. (2) 10 Ch. D. 626.

account of the business of a going concern you ought not to include the goodwill as an asset in the balance-sheet. So here it seems to me that the accounts of the previous years were quite right in omitting the goodwill, and the account to be taken as of March 31, 1891, ought not to have goodwill included in it.

But it was said that it would be right to include the goodwill here, because the firm had sold or agreed to sell certain assets for the sum of 19,000*l.*, and therefore that sum, or the assets so sold, must come into the account. The 19,000*l.* certainly could not be brought into the account, because it had not been received; though no doubt you might put a value upon the things for the sale of which the 19,000*l.* was to be received. That is, you would be right in assessing the value of whatever items you were bringing into the balance-sheet having regard to the arrangement which everybody knew would be carried through for their sale at that price. It would be right therefore, in my opinion, to treat the lease as valued upon the footing of its being about to be sold in this way, and so also as to the plant and fixtures. But it is a totally different matter as regards the goodwill. It is not to be valued for the purpose of making out the balance-sheet; and if so, it follows that the price which it will fetch ought not to be introduced into the balance-sheet.

Then it is said that the goodwill was not really sold to the company, that the 6056*l.* which was ascribed to it represented nothing, and that in fact that sum ought to be added to the price which was obtained for the leasehold premises and the plant and fixtures. But as to that the parties are, in my opinion, bound by what they have done. They treated the leasehold premises in their claim as worth 5500*l.*, and the plant as worth 7123*l.*, and they cannot now increase those sums by adding to them or distributing between them the value which they ascribed to the goodwill.

Then it is said, that before March 31 the deceased partner had an interest in the goodwill. No doubt he had; but he died. Any of the partners might have died; and if any of them had died it is clear that under the articles, the value of the goodwill not being included in the last balance-sheet, his estate would not be paid for it. Under the articles the partnership is to be

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carried on by the surviving partners, and they will have the benefit of the goodwill. If, therefore, there was at the time at which the annual account ought to have been taken an arrangement pending for a sale of the goodwill by the firm, it was not then completed. It was not completed until afterwards; and in the meantime the partner who died had ceased to have any interest in the goodwill by reason of his death, and the goodwill had become the absolute property of the other partners. In my opinion, therefore, as the goodwill belonged to the surviving partners, they are the persons to whom the price of it should go, and it must not be brought into the account taken as of March 31, 1891.

It was said that the price of the plant and machinery and of the goodwill really included some things of which the surviving partners ought to have the sole benefit, such as the cost of putting up new machinery at whatever place they might choose to carry on their business; but I do not think that is included under these heads. No doubt the sums charged are large; but that is not the head under which the claim is made. There is also a further separate claim for removal and disturbance included in the purchase-money, and no part of this sum is claimed by the estate of the deceased partner, and it ought not to be brought into the balance-sheet. In my opinion, therefore, the sum allowed by the chief clerk in respect of the goodwill ought to be disallowed. The other items which he has allowed will stand.

Solicitors: *Stones, Morris & Stone; Gush, Phillips, Walters & Williams.*

W. L. C.

In re LOFTUS-OTWAY. OTWAY *v.* OTWAY.

[1895 L. 50.]

STIRLING J. 1895 April 24, 25.

Will—Life Interest—Forfeiture—"Liable to be deprived"—Commission of Act of Bankruptcy—Dismissal of Bankruptcy Petition.

H. was entitled in reversion to a life interest in certain property subject to forfeiture if he should do or suffer anything whereby he would "be deprived or be liable to be deprived" of the beneficial enjoyment thereof. Before his interest fell into possession he committed an act of bankruptcy upon which a bankruptcy petition was presented against him. After his interest fell into possession the petition was dismissed; but before the dismissal the trustees of the property had funds in their hands representing income which, but for the bankruptcy proceedings, might have been paid to him:—

Held, that a forfeiture had occurred.

White v. *Chitty* (L. R. 1 Eq. 372) and *Samuel* v. *Samuel* (12 Ch. D. 152) considered.

ORIGINATING SUMMONS.

Georgina Loftus-Otway, by her will dated August 8, 1881, appointed her husband and the plaintiffs executors and trustees thereof, and gave to her husband for his life her real and leasehold estate and the income of the proceeds of the sale and conversion of her residuary personal estate. After his death she directed that her residuary real and leasehold estate should be sold, and that her residuary estate should be held in trust to divide the same into four equal parts, and one of such shares was to be held upon trust to pay the income thereof to her son, the defendant Harold Otway, during his life, but subject to the proviso for determining such interest thereinafter contained, and after his death upon the trusts therein contained in favour of his widow and children. And the testatrix declared that, notwithstanding the trusts thereinbefore contained, if the said Harold Otway should at any time become bankrupt, or assign, anticipate, or incumber, or attempt to assign, anticipate, or incumber the income thereinbefore directed to be paid to him, or any part thereof, or should do or suffer any other act or thing whereby

STIRLING J. either directly or by operation of law he would, if absolutely entitled for life to such income, be deprived or be liable to be deprived of the beneficial enjoyment thereof, then her trustees should thenceforth during the then remainder of the life of the said Harold Otway apply such income or so much thereof as they should think fit for or towards the maintenance, or otherwise for the benefit of the said Harold Otway, his wife and children, as they should think proper, and should accumulate the residue of the income which should not be so applied by way of compound interest by investing the same in manner in the will directed, such accumulations to be added to the share in question, and to follow and be subject to the trusts and limitations in the will contained of such share.

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The testatrix died on May 19, 1885, and her husband died on November 18, 1894.

On October 6, 1894, Harold Otway was served with a bankruptcy notice requiring him to satisfy a judgment which had been recovered against him. He failed to do so; and on October 26 a petition in bankruptcy was presented against him. That petition was pending at the death of his father. On December 3 a second petition founded upon the same act of bankruptcy was presented against him. On January 18, 1895, his creditors held a meeting and passed a resolution that the affairs of the debtor should not be wound up in bankruptcy, and that the Court should be requested to dismiss the petition. On February 20, 1895, the first petition was brought on, and resulted in the registrar making a receiving order. That order was appealed from, and the appeal was heard on March 15, when the petition was dismissed on two grounds: first, a want of good faith on the part of the petitioner; and, secondly, that the petition was not one which would benefit the creditors, because it appeared that the only property of the bankrupt which was brought to the notice of the Court was the debtor's life interest, which was subject to the proviso for its cesser in the event of his bankruptcy. The second petition was dismissed on March 30, 1895. Harold Otway was married and had five children, all of whom were infants.

On January 7, 1895, the trustees of the will took out this

summons for the determination of the question how they were to deal with the income of the shares of the testatrix's residuary estate in which the defendant Harold Otway took a determinable life interest under her will, and in particular whether the discretionary trusts thereby declared of the said income in favour of Harold Otway, his wife and children, had come into operation, and if so, from what date.

In an affidavit filed by the trustees in support of the summons, they stated that the income of the fund amounted to about 1500*l.* a year, and that they would, before the end of January, 1895, have in hand the sum of 450*l.* or thereabouts on account of that income.

Brinton, for the trustees, referred to *Smith* v. *Cooke* (1); *In re Simonson & Co.* (2); *In re Sartoris' Estate* (3); *Oldham* v. *Oldham.* (4)

Buckley, Q.C., and *G. F. Hart*, for Harold Otway. The words of the proviso are words of futurity, and no forfeiture has taken place: *In re Parnham's Trusts* (5); *White* v. *Chitty.* (6)

The principle of those cases was affirmed in *Samuel* v. *Samuel* (7), where it was said that a clause of this kind ought to be so construed as to give effect to the testator's intention, namely, that the bequest should enure to the personal enjoyment of the legatee. Here the act of bankruptcy committed by Mr. Otway never did and never can result in actual bankruptcy, and consequently he was never liable to be deprived of the income. "Liable" must mean "liable in law": *Ex parte Dawes.* (8) In *Oldham* v. *Oldham* (4) there was an actual assignment for the benefit of the beneficiary's creditors.

Costelloe, for Mrs. Otway. The words "liable to be deprived" import a risk or peril of deprivation. Actual deprivation is not necessary to bring about a forfeiture. If at any time Mr. Otway has done or suffered anything so as to imperil the receipt of the income by himself, then the forfeiture must occur. He has in fact put it within the power of the Court to take away the income

(1) [1891] A. C. 297.
(2) [1894] 1 Q. B. 433.
(3) [1892] 1 Ch. 11.
(4) L. R. 3 Eq. 404.
(5) 46 L. J. (Ch.) 80.
(6) L. R. 1 Eq. 372.
(7) 12 Ch. D. 152.
(8) 17 Q. B. D. 275.

STIRLING J. from him. Pending the bankruptcy proceedings, no Court would have ordered the trustees to pay the income to him; so that for a time he was in fact deprived of the beneficial enjoyment of the income.

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Once having lost the right to receive the income by bankruptcy, the subsequent annulment of the bankruptcy cannot do away with the forfeiture which has accrued: *In re Parnham's Trusts.* (1) Both *Ex parte Dawes* (2) and *In re Parnham's Trusts* (3) are in accordance with the same principle, and support my contention. *Ex parte Eyston* (4), *In re Amherst's Trusts* (5), and *In re Sartoris' Estate* (6), afford further illustrations of the principle upon which the Court acts in such cases as this; but in no case has the proviso for forfeiture been so wide in its terms.

Methold, for the children of Mrs. Otway. The forfeiture clause has come into operation: *Yarnold* v. *Moorhouse* (7); *Hill* v. *Cowdery.* (8)

Buckley, Q.C., in reply. "Liable to be deprived" must mean that the person is in actual danger of having his income taken away by reason of his having done something which necessarily involves the consequence of deprivation. Here Mr. Otway still has the control of his property. The cases where there has been an annulment of bankruptcy shew the principle upon which the Court acts.

[Stirling J. Sir George Jessel seems to have thought in *Samuel* v. *Samuel* (9) that in order to prevent a forfeiture the annulment must have taken place before the beneficiary's interest came into possession. Lord Hatherley, on the other hand, in *White* v. *Chitty* (10), was apparently of opinion that it would be sufficient if it took place before any payment became due.]

At the time when the first payment of income might have been made to him, Mr. Otway was not in a proper sense liable to be deprived of it.

(1) L. R. 13 Eq. 413.
(2) 17 Q. B. D. 275.
(3) 46 L. J. (Ch.) 80.
(4) 7 Ch. D. 145.
(5) L. R. 13 Eq. 464.
(6) [1892] 1 Ch. 11.
(7) 1 Russ. & My. 364.
(8) 1 H. & N. 360.
(9) 12 Ch. D. 152.
(10) L. R. 1 Eq. 372.

In *Ex parte Eyston* (1) there was an adjudication and the bankruptcy was still subsisting when the question arose.

In *In re Amherst's Trusts* (2), the expression "part from" was used, and the beneficiary had parted with his interest by presenting a petition for liquidation.

In *In re Sartoris' Estate* (3) a receiving order had been made; in *Yarnold* v. *Moorhouse* (4) the decision went upon the ground that the creditors could have taken the fund; and in *Hill* v. *Cowdery* (5) there was an actual assignment by way of mortgage: so that none of those cases have any bearing upon the present.

The true principle is shewn by *Samuel* v. *Samuel.* (6)

There cannot be any liability to deprivation where the beneficiary is still in a position to enjoy the income. An act which involves no consequence cannot bring about such a liability.

STIRLING J. (after stating the facts). The dismissal of the petition was grounded on s. 7, sub-s. 3, of the Bankruptcy Act, 1883, under which the Court has a judicial discretion as to making an order on a bankruptcy petition or not.

It was contended on behalf of Mr. Harold Otway that, under these circumstances, he never at any time did or suffered any act or thing whereby or in consequence whereof, either directly or by operation of law, he would, if absolutely entitled for life to the income, be liable to be deprived of the beneficial enjoyment thereof, within the meaning of the proviso in question; and, secondly, it was said that, even if at any time he did become so liable, that liability ceased to exist at a sufficiently early date to prevent the gift over taking effect according to the principle laid down by Lord Hatherley in *White* v. *Chitty* (7), and approved by the late Master of the Rolls in *In re Parnham's Trusts* (8) and *Samuel* v. *Samuel.* (6)

These two points have to be considered. The first question is, what is the meaning of the words "be liable to be deprived of the beneficial enjoyment thereof"? It is contended that a person is not liable to be deprived of the beneficial enjoyment

(1) 7 Ch. D. 145.
(2) L. R. 13 Eq. 464.
(3) [1892] 1 Ch. 11.
(4) 1 Russ. & My. 364.
(5) 1 H. & N. 360.
(6) 12 Ch. D. 152.
(7) L. R. 1 Eq. 372.
(8) 46 L. J. (Ch.) 80.

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of the income within the meaning of that clause unless he has done something the necessary consequence of which is that he should be so deprived—that is to say, in the present case, that a Court, upon the facts being brought to its notice, would, without any exercise of discretion, be compelled as a matter of right to adjudge that the act committed by Mr. Otway was one which deprived him of the beneficial enjoyment of his income. It is important to observe the language of this particular clause, which apparently has not occurred in any instrument which has as yet called for judicial interpretation. The words are not merely "be deprived," but "be deprived or be liable to be deprived," and there is a contrast between being deprived and being liable to be deprived. The words "be liable to be deprived" are meant to add something to that which goes before. The preceding words take away the income in the event of the commission of an act whereby, or in consequence whereof, either directly or by operation of law, he would be deprived of it. I think that those earlier words, "whereby or in consequence whereof, either directly or by operation of law, he would be deprived," apply to acts of the nature of those which it is said, on behalf of Mr. Otway, would make him liable to be deprived of the beneficial enjoyment of the income—that is to say, acts the necessary consequence of which is a deprivation of the beneficial enjoyment. It seems to me that the latter words must be read as including acts which, so far as the person who committed them is concerned, would put it out of his power to have any voice in the matter, and would leave it with a Court of justice to say whether or not he is to be deprived. In this sense the act of bankruptcy committed by Mr. Otway in the lifetime of his father was an act which rendered him liable (no doubt in the discretion of the Court) to be deprived of the beneficial enjoyment of the income. The liability existed, although the Court did not see fit to enforce it.

Then if that be so, and a liability did exist at the death of the tenant for life, was that liability got rid of in time to bring into operation the doctrine laid down by Lord Hatherley in *White* v. *Chitty*? (1) In *White* v. *Chitty* (1) the facts were these.

(1) L. R. 1 Eq. 372.

There was a devise of freeholds by a testator to the use of Charles Chitty, his son, for life; and, after his death, to the use of his grandson, Richard Chitty, for life, with remainder over. Then there was a proviso that if any of his sons or grandsons should be declared bankrupt, or assign, charge, or incumber their respective life interests, and so forth, then the rents, which but for this provision he or they respectively would be entitled to, should, during the remainder of his or their life interests therein respectively, from time to time sink into and be added to and form part of his general personal estate. At the time of the death of the testator the son Charles Chitty was an undischarged bankrupt. No creditor's assignee was ever appointed under the bankruptcy. But on March 22, 1865, the bankruptcy was annulled by the Court of Bankruptcy, and the question arose whether the forfeiture clause had come into operation. What Lord Hatherley said was this (1): "The question is, has a forfeiture occurred, when, before any actual demand made, or possession taken by the official assignee, before one sixpence had accrued to him, the bankrupt, by his diligence and activity, obtained an annulment of the bankruptcy, so that at the time when the first rents accrued, there was no hand but his to receive them?" And he answered that question in the negative. His opinion was based on this, that at the time when the first rents accrued there was no hand but the son's to receive them. That that is the meaning of the decision is shewn, I think, by the case of *In re Parnham's Trusts* (2), which afterwards came before Lord Romilly. There a fund was given (subject to prior life interests) to R. for life, but it was provided that if (amongst other things) by act or operation of law he should be personally deprived of the receipt and benefit of the bequest, that the life interest should cease, and the principal money and income should go to the persons entitled in remainder. At the time of the determination of both the prior life interests, and for several years afterwards, R. was a bankrupt, and in consequence of such bankruptcy certain rents and the shares of the funds to which but for his bankruptcy R. would have been entitled for life were paid into Court under the Trustee Relief Act. Before any petition was

(1) L. R. 1 Eq. 376. (2) L. R. 13 Eq. 413, 416.

STIRLING J. presented for payment of the fund, or application of the income thereof for the benefit of the persons entitled in remainder, R. procured the annulment of his bankruptcy on the terms that the past dividends should be paid to the assignee. It was held that R. had nevertheless forfeited his life interest. The case of *White* v. *Chitty* (1) was cited and relied upon; but Lord Romilly said: "I am of opinion that this is a clear case of forfeiture, and that the rents and dividends, which would have come to the petitioner but for his bankruptcy, have been intercepted by the person to whom they were given in that event. I agree that the payment into Court cannot affect the question; but the payment to or retention by the trustees is a clear interposition, and they hold and accumulate the income exactly as the testator has directed in the case of bankruptcy. The cases, therefore, of *White* v. *Chitty* (1) and *Lloyd* v. *Lloyd* (2) have no application, or rather the reasons given for those decisions shew that there is a forfeiture in the present case."

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Another gift under the same will afterwards came before the late Master of the Rolls, Sir George Jessel, in a case of *In re Parnham's Trusts.* (3) There, after the annulment of a bankruptcy, another tenant for life died, and the same son who had been adjudicated bankrupt, and whose bankruptcy had been annulled, claimed the income of the share of the estate which passed over to him under a gift in the will. Sir George Jessel there said: "I think that, having regard to the authorities, I must decide in favour of the petitioner. There are no less than three reported cases, namely, *White* v. *Chitty* (1), which is more than ten years old, *Lloyd* v. *Lloyd* (2), and *Trappes* v. *Meredith* (4), and they all go upon the same principle, that where the words of the proviso for forfeiture are words of futurity, there the forfeiture does not take place, if the bankruptcy has been annulled before the first payment becomes due. As it appears to me that this case cannot be distinguished from those cases, I shall simply follow them, and make the order." The same point came again before Sir George Jessel in the case of *Samuel* v. *Samuel* (5),

(1) L. R. 1 Eq. 372.
(2) L. R. 2 Eq. 722.
(3) 46 L. J. (Ch.) 80.
(4) L. R. 9 Eq. 229.
(5) 12 Ch. D. 152.

and there he discussed the prior decisions at great length, and referred to *Trappes* v. *Meredith* (1) and *White* v. *Chitty* (2). Referring to *White* v. *Chitty* (2), he says (3): "There the bankruptcy had been annulled; and Lord Hatherley, when Vice-Chancellor, held that the annulment of the bankruptcy being before the first receipt of money under the gift, and there being nothing therefore to deprive the legatee of personal enjoyment, no forfeiture had occurred. I see that in *In re Parnham's Trusts* (4) I also held that there having been an annulment, there was no forfeiture. In that case the annulment took place in the lifetime of the tenant for life, and I said I doubted the decision of *White* v. *Chitty* (2); but for this reason, not that I doubted the principle, but that I doubted whether the principle ought to apply to an annulment after the death of the tenant for life, and whether the fact of the actual receipt of income should have made any difference. I had not the slightest doubt as to the right application of the principle, and I followed it in *In re Parnham's Trusts*. (4) But that is a very minute point indeed, namely, whether, to prevent a forfeiture, the vacation of the charge or the destruction of the incumbrance ought to take place before the period of distribution, or whether it is sufficient if it takes place only before the first date of actual payment. I still think, upon that minute point, the right period is the period of distribution; in the present case it is so certainly, because the testator points expressly to the death of the tenant for life." There appears, therefore, to have been a difference of opinion between Lord Hatherley and Sir George Jessel as to the exact time at which the operation of the doctrine of *White* v. *Chitty* (2), which is admitted by both the learned judges to be a sound one, is to be applied.

According to Sir George Jessel's view, the liability to deprivation in this case ought to have ceased at the time of the death of the first tenant for life—that is to say, in November, 1894. According to the view of Lord Hatherley, it would have been sufficient if it had ceased before the time arrived for the first payment of income. Now I am not concerned, it appears to me,

(1) L. R. 9 Eq. 229.
(2) L. R. 1 Eq. 372.
(3) 12 Ch. D. 158.
(4) 46 L. J. (Ch.) 80.

STIRLING J. to decide which of these two views ought to prevail; in fact, having regard to the actual decision of Lord Hatherley, and what was said by Sir George Jessel himself, it would be right, in my opinion, that, as a judge of first instance, I should follow Lord Hatherley's view, if it were necessary so to decide.

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In re LOFTUS-OTWAY. OTWAY *v.* OTWAY.

Now it seems to me that, supposing I were to adopt the view expressed by Lord Hatherley, the liability ought to have been got rid of before January 31 in the present year at the latest. It had not been got rid of then. In fact, as I have already pointed out, on February 21 there was an adjudication by the registrar, though the Court of Appeal held that that was not right. But on January 31 both petitions were still pending; and it seems to me that at that moment a liability existed within the meaning of the proviso.

I am of opinion, therefore, that at that date the liability had not been got rid of so as to bring the case within the doctrine of *White* v. *Chitty* (1), and consequently that the forfeiture clause has come into operation, and that the income is liable to be applied as from the death of the tenant for life for the benefit of Mr. Otway, his wife and children, in the manner prescribed by the will.

Solicitors: *Ellis & Ellis; Michael Abrahams, Sons & Co.; Lumley & Lumley; The Official Solicitor.*

(1) L. R. 1 Eq. 372.

G. A. S.

WILMER *v.* McNAMARA & CO., LIMITED.

STIRLING J.
1895
April 5, 26.

[1895 W. 596.]

Company—Trading Company—Dividends—Depreciation of Assets—Liability of Company to make good before Payment of Dividend.

A company was formed in 1887 to purchase and carry on an existing carriers' business, under articles which provided that no dividend should be payable except out of profits arising out of the business of the company.

The capital of the company was 120,000*l.*, in 12,000 shares of 10*l.* each, of which 7000 carried the right to a preferential cumulative dividend, and 5000 were ordinary shares.

The price paid by the company for the business was 54,000*l.* in cash and 50,000*l.* in ordinary shares. The 7000 preference shares were issued and fully paid up in cash, out of which 54,000*l.* was paid to the vendor, to whom were also allotted, as fully paid up, the whole of the ordinary shares.

In taking the yearly accounts substantial allowances were made for depreciation of leases, goodwill, and plant, and charges were made against income for maintenance of plant and repairs to buildings.

In 1893 no dividend was paid, and according to a valuation made in 1894 the assets of the company, including goodwill, fell short of the nominal capital by about 43,000*l.*, but the profit and loss account for the same year shewed a profit of 5816*l.*, which the company proposed to apply in the payment of a dividend on the preference shares. On an application by a holder of ordinary shares for an injunction to restrain the payment of the dividend:—

Held, applying the principles laid down in *Verner* v. *General and Commercial Investment Trust* ([1894] 2 Ch. 239), that the dividend might lawfully be paid.

MOTION.

This was a motion by the plaintiff, who was the holder of ordinary shares in the defendant company, asking for an injunction to restrain the company from paying a dividend upon its preference shares.

The action was a friendly one, its object being to ascertain whether a dividend could be lawfully paid.

The company was formed in 1887. Its objects, as stated in the memorandum of association, were (1.) to acquire the carriers'

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business theretofore carried on by Mr. Arthur McNamara; and (2.) to carry on, develop, and extend the business so to be acquired, and generally to carry on the business of general carriers of mails, parcels, goods, and passengers, &c. The capital of the company was 120,000*l.*, divided into 12,000 shares of 10*l.* each, of which 7000 shares were preference shares, carrying the right to a fixed preferential cumulative dividend at the rate of 8 per cent. per annum on the capital paid up thereon, and 5000 were ordinary shares, carrying the right to have the surplus profits, subject to the payment of the preferential cumulative dividend, applied to the payment of dividend on the capital paid up thereon, in accordance with and subject to the provisions of the company's articles of association.

The material provisions of the articles were as follows :—

"116. Subject to the provisions of these presents the profits made during the financial year or other period, comprised in the accounts submitted to each ordinary general meeting, shall be applicable first to the payment of the fixed preferential dividend on the preference shares to the close of that year or other period, and the surplus shall be applicable to the payment of dividend on the ordinary shares.

"117. No dividend shall be payable except out of profits arising out of the business of the company, and capital paid up in advance of calls shall not whilst carrying interest confer a right to dividend.

"118. The directors may, if they think fit, from time to time determine on and declare an interim dividend to be paid to the members.

"119. The directors may, before recommending any dividend, set aside out of the profits of the company such sum as they think proper as a reserve fund, not exceeding 10 per cent. of such profits. Provided always that the action of the directors in setting aside such sum as a reserve fund be approved by the company at the ordinary general meeting held next after the same shall have been so set aside. This reserve fund shall, at the discretion of the directors, be applicable for meeting contingencies for the gradual liquidation of any debt or liability of the company, or for repairing or maintaining the works and for preserving in

efficiency the stock and plant connected with the business of the company or any part thereof, or shall with the sanction of the company in general meeting be as to the whole or in part applicable for equalizing dividends, or for distribution by way of bonus among the members of the company for the time being, on such terms and in such manner as the company in general meeting shall from time to time determine."

Art. 124 provided for the keeping of accounts, and arts. 126 and 127 were as follows:—

"126. The directors shall lay before the company in general meeting (commencing with the ordinary general meeting in the year 1888) a statement of the income and expenditure for the past year, made up to the 30th day of June then last past. The statement so made shall shew under the most convenient heads the amount of gross income, distinguishing the several sources from which it has been derived, and the amount of gross expenditure, distinguishing the expense of the establishment, salaries, and other like matters. Every item of expenditure fairly chargeable against the year's income shall be brought into account, so that a just balance of profit and loss may be laid before the meeting; and in cases where any item of expenditure which may in fairness be distributed over several years has been incurred in any one year, the whole amount of such item shall be stated, with the addition of the reasons why only a portion of such expenditure is charged against the income of the year.

"127. A balance-sheet shall be made out in every year and laid before the company in general meeting (commencing with the ordinary general meeting in 1888), and such balance-sheet shall contain a summary of the property and liabilities of the company, arranged under the heads appearing in the form annexed to Table A in the first schedule to the Companies Act, 1862, or as near thereto as circumstances will admit."

By an agreement dated July 8, 1887, the company agreed to purchase and take over as from July 1, 1887, the business of a carman, Government contractor, railway agent, and otherwise, theretofore carried on by Arthur McNamara, deceased, and the goodwill thereof, and the leasehold hereditaments, coach-houses, offices, yards, stabling and premises therein particularly described

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(the longest of which had about forty years to run), and the horses, vans, carts, carriages, stores, stock-in-trade, wheelwrights' and van-builders' stock, fixtures, machinery, and effects generally used in and belonging to the business, for the consideration of 54,000*l.* cash and the allotment to the vendor or his nominees of 5000 ordinary 10*l.* shares in the capital of the company, which were to be deemed to be fully paid up. Certain stores were to be paid for at cost price, and certain new vans, carts, &c., required for the purpose of a contract with the Post Office, were to be paid for at the price of 4100*l.* to the persons who supplied the same.

The whole of the 7000 preference shares were subscribed for and issued and fully paid up in cash. Out of the 70,000*l.* which thus came to the hands of the company 54,000*l.* was paid to the vendor under the agreement of July 8, 1887; 4100*l.* was paid in accordance with the same agreement; additional sums amounting to 7586*l.* 9*s.* 11*d.* were paid for additional horses, coaches, &c. The balance was partly invested and partly placed on deposit. The 5000 ordinary shares were allotted as fully paid up to the vendor or his nominees.

In making up the accounts for the year ending June 30, 1888, an allowance was made for depreciation in leases, goodwill, and plant of 3810*l.*; in each of the years ending June 30, 1889, 1890, 1891, a similar allowance was made of 2000*l.*; for the year ending June 30, 1892, an allowance of 250*l.* only was made.

In their report for that year the directors expressed their regret that the margin of profit did not permit them to place a greater amount than 250*l.* to depreciation account, and stated that it was fully intended in the future to maintain this item at the highest possible level when profits permitted.

In all these years (down to and including June 30, 1892) substantial charges were made against income for van maintenance, horse renewal, and repairs to buildings. A fund was set apart as a reserve in the earlier years of the company; but this was given up in 1891, and the amount (1557*l.* 10*s.*) was brought into profit and loss account. In the spring of 1893 the directors caused valuations to be made of the property of the company with the following results:—

The leaseholds were valued at 20,600*l.*, the horses at 16,868*l.*, the rolling-stock and utensils at 13,306*l.* 13*s.*, making at the date of the valuation a total of 50,774*l.* 13*s.*

Between the date of the valuation and June 30 in that year, an additional expenditure of capital took place to the amount of 484*l.* 8*s.*, bringing up the value of the property of the company to 51,259*l.* 1*s.*; and there were stores and machinery not included in the valuation amounting to 2342*l.* 15*s.* 9*d.*

The total value of the assets of the company at this date (exclusive of goodwill) was found to be in round figures 62,800*l.*; the goodwill was estimated at 20,000*l.*; while the liabilities to creditors amounted in round figures to 12,400*l.*, leaving a balance of 70,400*l.*

In the year ending June 30, 1893, no dividend was declared or paid.

For the year ending June 30, 1894, the value of the assets (including goodwill estimated as before) was found to be 86,750*l.* in round figures, while the liabilities to creditors were 10,500*l.*, leaving a surplus of 76,250*l.* The receipts (after allowing for horse renewal to the amount of 5025*l.* 11*s.* 5*d.*, van maintenance to the amount of 3753*l.* 3*s.* 2*d.*, and repairs to buildings 334*l.* 17*s.* 2*d.*) exceeded the expenditure by 6582*l.* 16*s.* 10*d.*; and after deducting a sum of 200*l.* for depreciation on leases, a reserve for bad debts, &c., the profit and loss account shewed a sum of 5816*l.* 12*s.* 6*d.* to the credit of profit. At a meeting of the company held on September 11, 1894, it was resolved that this sum be applied by the directors in paying a dividend to the preference shareholders, and the object of the motion was to restrain the company from acting on this resolution.

An affidavit filed by the secretary of the company stated that the horses and rolling-stock of the company had been fully maintained out of revenue, and were now of greater value and in better condition than they were when the company was formed. There was no evidence as to the comparative values of the leaseholds and goodwill; but it was assumed by the Court that these were now of less value than when the company was formed.

A scheme for the reduction of the capital of the company had been brought before the shareholders, but had not been adopted.

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Hastings, Q.C., and *Buckmaster*, for the ordinary shareholders. In *Verner* v. *General and Commercial Investment Trust* (1) the decision was based on the peculiar nature of the constitution of that particular company; it was an investment company, and not, as this is, an ordinary trading company. There has been a loss of capital to the extent of about 50,000*l.*, which ought to be taken into account in estimating profits. That appears from the observations of Kay L.J. (2)

The case relied upon for the plaintiffs in *Verner* v. *General and Commercial Investment Trust* (1) was *Lubbock* v. *British Bank of South America.* (3) That was the converse of the present case: the assets shewed a balance which was carried to profit and loss account and divided, and it was held that the directors were right in doing that.

The ground of the decision was that the company was a trading company. No trading company can ascertain its profit or loss until it has brought in the result of its balance-sheet. If the balance-sheet shews a surplus, then that may be brought in and added to the profit to be divided; if, on the other hand, it shews a deficiency, then by the same process of reasoning that must be brought in before the profit available for division can be ascertained.

Buckley, Q.C., and *Howard Wright*, for the company. The dividend in this case is properly payable.

In *Lubbock's Case* (3) the company's capital assets increased in value and were sold for more than they originally cost. Of course the accretion was profit in some sense, and the company had a right to dispose of it. But supposing there had been a fall in value as here, would the company have been compelled to provide for it in profit and loss account? As to that, *Lubbock's Case* (3) decided nothing.

In *Verner* v. *General and Commercial Investment Trust* (1) the exact point for determination by the Court was comparatively simple; but the question was argued and dealt with on the broad basis of the proper form of keeping the accounts of a company as between capital account and revenue account.

(1) [1894] 2 Ch. 239. (2) [1894] 2 Ch. 268.
(3) [1892] 2 Ch. 198.

The decision in *Lee* v. *Neuchatel Asphalte Co.* (1), which formed the basis of that in *Verner* v. *General and Commercial Investment Trust* (2), was that if the memorandum of association of a company describes as an object of the company the investment of the capital in a wasting asset, then that wasting is within the objects of the company, and in arriving at profits for division the company need not provide for it. The principle is that for the purpose of ascertaining profit you must debit against revenue account all charges which arise from the wearing out of the things which are consumed in earning the profit. But you are not bound to shew upon the assets side of the capital account assets of a value sufficient to answer all the items of debit including the debit to shareholders. According to the view of Lindley L.J. the amount put to the debit of shareholders is not a debit of the company at all. The capital account shews how you have spent your money; and in revenue account you must shew how you have dealt with the assets thus acquired, and whether, after providing for the wearing out of circulating capital—that which is consumed in earning profits—there results a balance to the credit of that account. If so, then you are entitled to divide it as profit.

If you sink your original capital by buying too dearly, then that is not a loss which has to be made good before profit can be earned. But if, in the course of your trading operations, you have made a loss, then that must be taken into account. Here the company no doubt gave too much for the business; but they have carried it on on the footing of providing for the wearing out of that which is worn out in the course of earning profits, and there remains a balance which is properly divisible as profit.

R. Burleigh Muir, for the preference shareholders. I adopt the arguments addressed to the Court on behalf of the company. If the plaintiff's contention is good, then, as soon as the company was formed they ought either to have reduced their capital to the actual value of the assets, or to have set aside the balance of income every year until the 50,000*l.* loss was made good. In other words, they ought to have made good the capital of the

(1) 41 Ch. D. 1. (2) [1894] 2 Ch. 239.

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ordinary shareholders out of the dividends of the preference shareholders. The effect of that shews that in this case the rule that dividends must not be paid out of capital is not infringed.

Hastings, Q.C., in reply. Beyond the observations of the learned judges in *Lee* v. *Neuchatel Asphalte Co.* (1) that case is not applicable to the present. This is not a case of wasting assets. The real question is whether there can be "profits" until the credit or debit balance, as the case may be, has been brought from the balance-sheet into profit and loss account. In a trading company you cannot arrive at the true profit until that has been done.

Cur. adv. vult.

April 26. STIRLING J. (after stating the facts). There is no question of the solvency of the company; the matter in dispute affects the shareholders only, and the question is whether the proposed dividend can lawfully be paid.

The nominal share capital amounts to 120,000*l.*; the assets fall short of this by upwards of 43,000*l.* Of this nominal capital, however, the sum of 70,000*l.* only was received by the company in cash; the balance of 50,000*l.* was issued in payment to the vendor for the business, &c., purchased by the company. Under these circumstances the case of *Lee* v. *Neuchatel Asphalte Co.* (1) applies to this extent, that it is a distinct authority that dividends may be paid although the assets are not sufficient to make up the share capital. On this none of the learned judges in the Court of Appeal appear to me to have expressed any doubt. It is sufficient to refer to what is said by Cotton L.J. (2): "The plaintiff's second point is that the property of the company is not now sufficient to make good the share capital; that assets to provide for that share capital must be made up before any dividend can be declared; and that if dividends are declared without that being done, that is to be treated as a return and a division of capital amongst the shareholders, and therefore illegal. In my opinion that is entirely wrong. It is a misapplication of the term 'return of capital.'" Beyond this *Lee* v. *Neuchatel Asphalte Co.* (1) does not assist so far as decision

(1) 41 Ch. D. 1. (2) 41 Ch. D. 15.

goes, for there it was held as a conclusion of fact that the assets of the company were at the period when the dividend was proposed to be paid of greater value than when the company was first formed. That appears from a passage immediately preceding that which I have read from the judgment of Cotton L.J. I think, however, as has already been pointed out in *Verner* v. *General and Commercial Investment Trust* (1), that the Court of Appeal there laid down principles which go far beyond what was required for the decision of that particular case, and among others, that in determining whether a dividend may or may not be paid, regard is to be had to the constitution of the company and the articles of association. As it is put by Lindley L.J. in the same case (p. 265): "A company may be formed upon the principle that no dividends shall be declared unless the capital is kept undiminished, or a company may contract with its creditors to keep its capital or assets up to a given value. But in the absence of some special article or contract, there is no law to this effect." Later on he adds: "Even a sinking fund to replace lost capital by degrees is not required by law." In the present case no contract with creditors has been brought to my notice; and indeed, as I have already observed, the case is not one in which the interest of creditors is involved. I have therefore only to consider the articles of association, which closely resemble those in Table A of the Companies Act, 1862. Now, article 117 says: "No dividend shall be payable except out of profits arising out of the business of the company." What are the profits here referred to? On this point the observations of Lindley L.J. are to be borne in mind (2): "It has been already said that dividends presuppose profits of some sort, and this is unquestionably true. But the word 'profits' is by no means free from ambiguity. The law is much more accurately expressed by saying that dividends cannot be paid out of capital, than by saying that they can only be paid out of profits. The last expression leads to the inference that the capital must always be kept up and be represented by assets which, if sold, would produce it; and this is more than is required by law. Perhaps the shortest way of expressing the distinction which I am

(1) [1894] 2 Ch. 239, 255. (2) [1894] 2 Ch. 266.

STIRLING J. endeavouring to explain is to say that fixed capital may be sunk and lost, and yet that the excess of current receipts over current payments may be divided, but that floating or circulating capital must be kept up, as otherwise it will enter into and form part of such excess, in which case to divide such excess without deducting the capital which forms part of it will be contrary to law."

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Apart from the use of the word "profits" in art. 117, I see nothing in these articles which would lead to the inference that their framers intended the capital of the company (or rather, according to the view suggested by *Lee* v. *Neuchatel Asphalte Co.* (1), assets of the value of those acquired by the company at its formation) to be kept up; and art. 126 seems to me to shew that what was contemplated by the word "profits" was the excess of receipts over all expenditure properly attributable to the year. A similar view of articles of association appears to have been taken by Romer J. in *Bolton* v. *Natal Land and Colonization Co.* (2), a case which is referred to with approval in *Verner* v. *General and Commercial Investment Trust.* (3)

It is necessary, however, to consider whether the depreciation in goodwill and leases is to be treated as loss of "fixed" capital or of "floating or circulating" capital, to use the two contrasted expressions of Lindley L.J. Depreciation of goodwill seems to me to be loss of "fixed" capital. It closely resembles the loss which a railway company might be said to sustain if it were found that a line which had been made, say ten years ago, at a certain cost, could now be made for a very much smaller amount, and consequently would not yield, if it were sold, the price expended in making it. On this point I refer to what is said in *Lee* v. *Neuchatel Asphalte Co.* (1) by Lindley L.J. at pp. 22–3, and by Lopes L.J., at pp. 26–7.

I think, therefore, that the balance-sheet cannot be impeached by reason of its not charging anything against the receipts of the year in respect of depreciation of the value of the goodwill. I confess that I have felt more doubt whether the sum actually charged for depreciation of leaseholds, namely, 200*l.*, is sufficient.

(1) 41 Ch. D. 1. (2) [1892] 2 Ch. 124.
(3) [1894] 2 Ch. 239.

The evidence filed on behalf of the plaintiff does not, however, in any way challenge the accuracy of the accounts rendered by the directors, nor was it suggested in argument that they are improperly framed. I must take it, therefore, that the amount thus charged is that which in the judgment of the directors, honestly exercised, ought fairly to be charged against the year's income. I may also add that it appears to me that even if a bonâ fide dispute existed as to the proper amount, the case of *Bolton* v. *Natal Land and Colonization Co.* (1) shews that the Court would not in such a case interfere by way of injunction. Under these circumstances I think that a case has not been made such as to justify the granting of an injunction.

My attention was pointedly called to the opening sentences of the judgment delivered by Kay L.J. in *Verner* v. *General and Commercial Investment Trust* (2) The observations there found are certainly deserving of the utmost attention, and I have carefully considered them. They appear, however, to be mainly directed to the case of a company engaged in buying and selling, and were not treated by the Lord Justice himself as applicable to the case actually before him, where the business of the company consisted in making investments. In the present case the defendant company carries on the business of a carrier: it does not buy and sell; and such loss as has occurred does not arise from the company having received a price less than it originally gave for a portion of its assets. I think that under these circumstances I ought not to apply the observations in question to the present case, any more than they were applied in *Verner* v. *General and Commercial Investment Trust.* (2) The result is that the motion must be refused.

Solicitors: *M. W. C. Smelt; Freshfields & Williams.*

(1) [1892] 2 Ch. 124. (2) [1894] 2 Ch. 239, 268.

G. A. S.

KEKEWICH J.

1895

March 30.

In re FREME'S CONTRACT.

[1895 F. 356.]

Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict.* c. 41), s. 5—*Discharge of Incumbrances on Sale—Question of Construction as to Interests in Futuro—Will—Codicil—Annuity—Revocation by Codicil of Gift contained in Will.*

Upon an application to the Court under s. 5 of the Conveyancing and Law of Property Act, 1881, to make provision for incumbrances on land, and the sale of the land freed therefrom, the Court will decide a question of construction involving the determination of interests in futuro, if the decision of such question is necessary in order to ascertain what sum of money ought to be set aside to answer the incumbrances.

A testator by his will gave an annuity of 300*l.* to be paid to his granddaughter A., and to be a charge on certain land, and directed that after her death the said sum of 300*l.* should be raised and paid unto and amongst all her children as she should by deed or will appoint, and in default of appointment amongst her children equally. By a codicil to his will, after reciting that he had given to his "granddaughter A." an annuity of 300*l.*, he revoked the devise of the "said" annuity, and "instead thereof" gave to his "granddaughter A." an annuity of 150*l.*, to be payable and charged in the same manner and on the same hereditaments as the said annuity of 300*l.* was in and by his will made payable and charged. The children of the granddaughter were not referred to in the codicil:—

Held, that the effect of the codicil was to substitute an annuity of 150*l.* payable to the granddaughter A., her appointees and children, for the annuity of 300*l.* given by the will.

WILLIAM PURSER FREME, by his will dated February 27, 1877, after appointing executors and trustees, and specifically devising certain freehold estates to his son James for life, with remainders over, proceeded as follows: "I give and devise to my granddaughter Anne Helenor, the wife of Samuel Hall" [meaning thereby Anna Helena Hall the wife of Samuel Anton Hall] "an annuity of three hundred pounds a year, to be paid to her half-yearly for her sole and separate use and to be a charge on my property in John Street Liverpool, and after the death of my said granddaughter Anne Helenor I direct that the said sum of three hundred pounds shall be raised and paid unto and amongst all her children as she shall by deed or will and notwithstanding coverture direct or appoint, and in default of

such appointment amongst all the children of my said granddaughter Anne Helenor in equal shares during their respective lives. I give and devise unto my granddaughter Ellen Elizabeth the wife of Graham Lloyd a like annuity of three hundred pounds to be a charge upon the said property in John Street aforesaid and to be paid to her and her children in the same manner in all respects as the annuity hereinbefore given to my granddaughter Anne Helenor"; and after giving to his daughter Anne Tryphosa Dobb Clement, widow (since deceased), an annuity of 300*l.* charged on certain property in Oil Street, Liverpool, and giving an annuity of 150*l.* per annum to Sidney Clement, son of Anne Tryphosa Dobb Clement, for his life, to be paid half-yearly, such annuity to be charged on the property in John Street, Liverpool, and certain other property, and after making certain specific and pecuniary bequests, the testator devised and bequeathed all his real and personal estate not thereinbefore disposed of to his son James absolutely.

The testator made a codicil, dated March 22, 1877, to his will as follows: "Whereas I have by my will given and devised to each of my granddaughters Anne Helena Hall and Ellen Elizabeth Lloyd an annuity of 300*l.* per annum, and I have also by my said will given and devised to my grandson Sidney Clement an annuity of 150*l.* per annum, the said three several annuities being payable and charged in the manner and on the hereditaments in my said will particularly mentioned, now I hereby revoke the devises of the said several annuities, and instead thereof I give and devise as follows: namely to each of my said granddaughters Anne Helena Hall and Ellen Elizabeth Lloyd an annuity of 150*l.* per annum to be payable and charged in the same manner and on the same hereditaments as the said several annuities of 300*l.* each were in and by my said will respectively made payable and charged; and I give and devise unto my said grandson Sidney Clement an annuity of 100*l.* per annum to be payable and charged in the same manner and on the same hereditaments as the annuity of 150*l.* per annum was in and by my said will made payable and charged."

The testator died on September 10, 1878; and on his death his property in John Street, Liverpool, consisting of two warehouses,

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passed under the residuary devise contained in his will to his son James Freme charged with the annuities by the will and codicil given to Anna Helena Hall and Ellen Elizabeth Graham Lloyd and their children, and, jointly with other property passing under the residuary devise in the will contained, with the annuity of 100*l.* by the codicil bequeathed to Sidney Clement.

James Freme died on April 21, 1888, intestate, leaving John Rowden Freme, his eldest son and heir-at-law.

The annuitant Sidney Clement sold and assigned his annuity of 100*l.* per annum to John Rowden Freme.

By a contract in writing dated January 18, 1895, John Rowden Freme agreed to sell the two warehouses to the Royal Insurance Company for 30,200*l.* The contract provided that the vendor should immediately after the sale apply to the Chancery Division of the High Court of Justice under s. 5 of the Conveyancing Act, 1881, and endeavour to obtain an order discharging the property from the annuities, but that if the Court should refuse to make such an order, or should as a term thereof require payment into court of a sum exceeding the purchase-money, the vendor was to be entitled to rescind the contract.

The annuitants Anna Helena Hall and Ellen Elizabeth Graham Lloyd, in the will and codicil named, both had children (one of whom was an infant), but neither of them had executed any deed purporting to be an exercise of the power of appointment contained in the will.

This was a summons by John Rowden Freme, under s. 5 of the Conveyancing Act, 1881 (1), served upon the annuitants

(1) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 5: "(1.) Where land subject to any incumbrance, whether immediately payable or not, is sold by the Court, or out of court, the Court may, if it thinks fit, on the application of any party to the sale, direct or allow payment into court, in case of an annual sum charged on the land, or of a capital sum charged on a determinable interest in the land, of such amount as, when invested in Government securities, the Court considers will be sufficient, by means of the dividends thereof, to keep down or otherwise provide for that charge, and in any other case of capital money charged on the land, of the amount sufficient to meet the incumbrance and any interest due thereon; but in either case there shall also be paid into court such additional amount as the Court considers will be sufficient to

Mrs. Hall and Mrs. Lloyd and their children and the Royal Insurance Company, asking for an order that the applicant might be at liberty to transfer into Court to the credit of this matter the sum of 12,000*l.* 2*l.* 10*s.* per centum annuities, or such other sum of like annuities as the Court should direct; and that the costs of the respondents other than the Royal Insurance Company might be taxed; that upon such transfer into court and payment of the said costs and expenses the applicant might be at liberty to apply that the hereditaments comprised in the contract might be declared free from the annuities charged thereupon by the will and codicil, other than the annuity by the codicil given to the testator's grandson Sidney Clement; and that directions might be given for the payment, out of the dividends on the fund transferred, of their annuities to the persons entitled thereto, and for the payment of the balance of such dividends to the applicant.

Warrington, Q.C., and *Arkle*, for the applicant, asked that the summons might be amended so as to bring it within Order LIV. A, and thus enable the Court under its general jurisdiction to determine any question as to the existence of the incumbrances.

KEKEWICH J. granted the leave.

Warrington, Q.C., and *Arkle*, then submitted, first, that the annuities of 300*l.* given by the will were altogether revoked by

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meet the contingency of further costs, expenses, and interest, and any other contingency, except depreciation of investments, not exceeding one-tenth part of the original amount to be paid in, unless the Court for special reason thinks fit to require a larger additional amount.

"(2.) Thereupon, the Court may, if it thinks fit, and either after or without any notice to the incumbrancer, as the Court thinks fit, declare the land to be freed from the incumbrance, and make any order for conveyance, or vesting order, proper for giving effect to the sale, and give directions for the retention and investment of the money in court.

"(3.) After notice served on the persons interested in or entitled to the money or fund in court, the Court may direct payment or transfer thereof to the persons entitled to receive or give a discharge for the same, and generally may give directions respecting the application or distribution of the capital or income thereof.

"(4.) This section applies to sales not completed at the commencement of this Act, and to sales thereafter made."

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the codicil, and that in lieu thereof fresh annuities of 150*l.* were given; and, secondly, that the substituted annuities of 150*l.* were given to the granddaughters for their respective lives only, and not to their appointees or children in reversion.

Marten, Q.C., and *Ingle Joyce*, for Mrs. Hall and her children. We submit that under s. 5 of the Conveyancing Act, 1881, the Court will not determine during the lives of the annuitants the rights in futuro of the persons entitled after the deaths of the annuitants respectively. The section is permissive.

[KEKEWICH J. It is a remedial enactment.]

It merely empowers the Court to provide for the charge or incumbrance, and not to ascertain what the amount of the charge or incumbrance is, or to decide questions of construction. The Court can substitute money for land, without deciding any question of construction.

Then, upon the question of construction, it is submitted that the codicil has not interfered with the rights of the children of the granddaughters, who are accordingly entitled to the annuities of 300*l.* given to them by the will. The general rule of construction applies that where a devise in a will is clear it is incumbent on those who contend that it has been revoked by a codicil to shew that the intention to revoke is equally clear and free from doubt with the original intention to devise; and if there is any reasonable doubt whether the clause of revocation was intended to include the particular devise, then such devise must stand: *Barclay* v. *Maskelyne* (1); *Alt* v. *Gregory* (2); *Stocks* v. *Hammond.* (3) There is not in this codicil any absolutely clear revocation of the gift contained in the will of the annual sums of 300*l.* to the children of the granddaughters.

Renshaw, Q.C., and *E. S. Ford*, for Mrs. Lloyd and her children. In all the cases where the Court has been asked to decide a question in futuro the question has been raised by the parties themselves, and it is not the practice of the Court to decide such a question where infants are interested: *Curtis* v. *Sheffield.* (4) The annuities in the codicil are expressed to be given merely

(1) Joh. 124.
(2) 8 D. M. & G. 221.
(3) 2 N. R. 307.
(4) 21 Ch. D. 1.

"instead" of the annuities given by the will to the grand-daughters.

W. D. Rotch, for the Royal Insurance Company.

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KEKEWICH J. This section of the Conveyancing Act, 1881, is remedial, and intended to facilitate the sale of land. Until it came into force a purchaser was entitled to object that he did not get his estate in fee because there was a charge—it might be only an insignificant charge, such as a small legacy payable in futuro. He got off his bargain unless he and the vendor could arrange on some scheme of indemnity. It is quite possible that purchasers no longer raise any such difficulty, because they know that by resort to the Court under this section it can be cleared away. The enactment being remedial, I ought to give such elasticity to it as the words permit. No doubt the section contemplates the existence of a charge, or, as it is called, an "incumbrance," though the word "charge" is also used. The section begins with the words, "Where land subject to any incumbrance . . . . is sold by the Court," and, therefore, presupposes the existence of an incumbrance. If there is a question whether there is an incumbrance or not, that, I apprehend, cannot be determined under the section. Mr. Warrington was pressed with that, and asked for an amendment of the summons, so as to bring it within the general jurisdiction, and he then submitted that I ought first to construe the will and codicil, and determine whether there is an incumbrance before applying the section. I think that is right. I see no reason why I should not construe the will, and so use the Act in the remedial manner in which it was intended to be used. The objection is raised that I shall be construing this will and codicil as to future interests, and deciding now what is not necessary to be now decided. Now, as regards that, I apprehend that notwithstanding the distinction in *Curtis* v. *Sheffield* (1) to which Mr. Renshaw called my attention, the Court, with reference to deciding questions as to interests in futuro, has of late years been disposed to be far less strict than it formerly was. It has recognised the great convenience of deciding such questions where estates are to be divided, and so

(1) 21 Ch. D. 1.

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facilitating the division. I certainly have done that very often myself, and I know it has been done by other judges, and sometimes on a fiction that an immediate sale was intended. But where the case is one in which the remaindermen can be ascertained and the property can be sold and divided, as in a partition action or any other proceeding of that kind, my view is that the Court has of late years been much more ready to decide questions as to interests in futuro than it formerly was. I do not mean to say that that course ought always to be taken. The Court ought not to do it unless it is necessary. Where can it be more necessary than where it is desired to sell land at once, and to make a title to it, and that title cannot be made without deciding the questions? It seems to me that the section itself supports that view, because it in terms applies "where land subject to any incumbrance, whether immediately payable or not," is sold. It contemplates dealing with an incumbrance in futuro, not indeed in contingency, but still in futuro; and then it directs that provision should be made for the incumbrance—that is to say, for one which is not immediately payable. That certainly seems, so far as the language of the particular section is concerned, to be in aid of what I venture to think is the elasticity of modern times. I think, therefore, that I am bound, notwithstanding the objection, to go into the matter, it being a great convenience now to ascertain at once what sum of money ought to be set aside to answer these annuities so that a good title may be made to the purchaser, and the vendor, so far as possible, may get the proceeds of sale.

I therefore approach the words of the will. To my own mind, there is no real doubt about the intention of the testator expressed in the language which he has used. If there were, I should be bound to follow the rule laid down in *Barclay* v. *Maskelyne* (1) and other cases, and not to decide adversely to those who claim the larger sums. I may be wrong, but to me the case is clear. I do not agree with Mr. Warrington in the extreme view for which he has contended. There is a gift of an annuity to Helena, her appointees and children—that is to say, a gift of an annuity which she is to enjoy during her life, and which after her death

(1) Joh. 124.

is to be enjoyed by her appointees or children. But it is one annuity. It is not that another annuity is given on her death; but the annuity given to her for life is after her death given to the others. That seems to me to be perfectly plain on the face of the gift. It is to be observed that the testator uses the words "and after the death of my said granddaughter I direct that the said sum of 300*l.*" shall be raised and paid, &c., and it is said that having called it an annuity of 300*l.* a year he does not there say "the annuity of 300*l.*"; but that is only a little inaccuracy of reference. The meaning is, that what is given to Helena for life is given after her death to her appointees and children. It is the same to my mind as if he had said, "I give an annuity of 300*l.* to my granddaughter Helena, with remainder to her appointees, with remainder in default of appointment to her children." I need not dwell on the other annuity, because what is true of the gift to Helena must be true also of the gift to Mrs. Lloyd. It is given by reference, and it seems to me that it is given by correct reference, and so as to leave no room for doubt that the gifts are of the same character and the beneficiaries take in the same way. That being so, I turn to the codicil, bearing in mind that I must not imply any revocation, but must find it in express words. The first gift is this: "Whereas I have by my said will given and devised to each of my granddaughters Anne Helena Hall and Ellen Elizabeth Lloyd an annuity of 300*l.* per annum." It is quite true that he has given the annuity to Helena; but, according to my construction, what he has given to Helena for life he has also given to her appointees and children after her death—the same annuity. What substantial inaccuracy would there be in a testator, who had devised an estate in strict settlement to his eldest son for life with remainder to the first and other sons of such son in tail, saying in his codicil, "whereas I have devised Blackacre to my son John for life"? It would be perfectly true. He takes in the leading estate as indicating the whole. It seems to me that though the testator has not said in so many words "I have given it to my granddaughter Helena and her appointees and children," he has spoken of the annuity which he has given to her for life, and which same annuity after her death was to go to

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her appointees and children. It is that annuity to which he refers. He goes on: "I hereby revoke the devises of the said several annuities"; that is, not the annuity which he has given to Helena, but the annuity which he has also given to her appointees and children. He, no doubt, adds the words "and instead thereof." I recognise the force of those words which were relied on by Mr. Renshaw. "In the place of the annuity I have given to Helena of 300*l.* I give an annuity of 150*l.* to be payable . . . . in the same manner." He is revoking the gift, as I read it, of the whole annuity, the annuity to the granddaughter, and giving, instead of that previously given, another annuity, not to her only, but to go in the same way and be payable and charged in the same manner and on the same hereditaments. The result is that he substitutes the annuity of 150*l.* for the annuity of 300*l.*; and therefore it is necessary now to provide for an annuity of 150*l.* to Helena, i.e. Mrs. Hall, her appointees and children, and a like annuity of 150*l.* to Mrs. Lloyd, her appointees and children.

The order was then made according to the form in Seton on Judgments, 5th ed. vol. ii. p. 1374, No. 10, with a declaration as to the rights of the annuitants.

Solicitors: *Gibbons & Arkle, Liverpool*; *Patersons, Snow, Bloxam & Kinder, for Peele & Peele, Shrewsbury*; *Rowcliffes, Rawle & Co., for Holland & Rigby, Ashbourne*; *Garnett & Tarbet, Liverpool.*

C. C. M. D.

BISHOP *v.* SMYRNA AND CASSABA RAILWAY COMPANY.

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May 7.

[1894 B. 5821.]

Company — Winding-up — Profits—Earnings before Liquidation — Undrawn Profits—Preference Shareholders—Loss of Capital—Costs of Liquidation—Priority.

A sum of money standing to the revenue account of a limited company at the date of the commencement of the liquidation of the company, and representing net profits earned by the company down to that date, is applicable in the liquidation to the payment of arrears of dividend due at that date to the preference shareholders, in priority to the payment of a deficit on the capital account and of the costs of the liquidation.

THE defendants, the Smyrna and Cassaba Railway Company, Limited, were incorporated in May, 1864, under the Companies Act, 1862, for the purpose of making and working a railway—afterwards completed—from Smyrna to Cassaba in Asia Minor. The capital of the company was 800,000*l.* in 40,000 shares of 20*l.* each, of which 14,000 were preference shares and the remaining 26,000 were ordinary shares, the preference shares having the right to a dividend of 7 per cent. per annum in priority over the ordinary shares, and also to one-fifth of the remainder of the net revenue after deduction of a sum sufficient for paying a like dividend of 7 per cent. on the ordinary shares.

Article 58 provided for holding ordinary general meetings of the shareholders half-yearly, in April and October, for the purpose of receiving the balance-sheet of the accounts and the report of the directors.

Article 59: "For that purpose the balance-sheet shall be made up to the 31st December and 30th June in each year, and shall contain a true account of the capital, credits and properties belonging to the company, and the debts, gains and losses of the company which may have arisen in the course of the preceding half-year, and shall shew the balance remaining after payment of all expenses of maintenance and working of the railway, which balance shall be designated the 'net revenue.'"

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Article 61: "The approval by a general meeting of the balance-sheet and accounts shall be deemed conclusive as to their accuracy, and they shall not be afterwards re-opened."

Of the company's capital there were issued 6250 preference shares, and 19,687 ordinary shares, both issues having been paid up in full.

The company entered into certain conventions with the Ottoman Government with reference to the railway, under which that Government became indebted to the company in a large sum.

On July 16, 1894, the company went into voluntary liquidation and appointed a liquidator. Down to and including the year 1889 the dividends on the preference shares were paid in full, and dividends at various rates were also paid from time to time on the ordinary shares. Since 1889 no dividend had been paid on the ordinary shares, and the dividends on the preference shares had fallen into arrear, the amount of such arrears at the commencement of the liquidation being between 13,000*l.* and 14,000*l.*

At the company's half-yearly meeting in April, 1894, the accounts down to December 31, 1893, which were then adopted, shewed a balance to the credit of net revenue, after payment of part of the arrears of preference dividend, of 19,956*l.* 3*s.* 4*d.* Further accounts for the period from January 1, 1894, to July 26, 1894, that is, to a date subsequent to the commencement of the liquidation, shewed a total balance at the latter date of 22,295*l.* 6*s.* 1*d.* to the credit of the revenue account. The accounts also shewed that there was a net deficit on capital account of 16,405*l.* 12*s.* 3*d.*, being the balance of the company's claims against the Ottoman Government under the conventions. The result was that the 22,295*l.* 6*s.* 1*d.* was insufficient for payment in full of the deficit on capital account and the remaining arrears of dividend on the preference shares. The preference shareholders, however, claimed to have their remaining arrears of dividend paid out of the 22,295*l.* 6*s.* 1*d.* before any distribution thereof among the ordinary shareholders. On the other hand, the liquidator contended that this sum was applicable, first, towards making good the deficit on capital account, and secondly, in payment of the costs of the liquida-

tion; and that the ultimate residue (if any) was the only sum divisible among the preference shareholders in respect of their arrears of dividend.

To have these questions decided this action was by arrangement brought by the plaintiff, a preference shareholder, on behalf of himself and all other the preference shareholders, against the company, claiming a declaration that the preference shareholders were entitled to be paid their arrears of dividend down to the commencement of the liquidation out of the 22,295*l.* 6*s.* 1*d.*, or out of such part of the assets of the company as represented profits earned by the company down to the date of the liquidation, before any distribution among the ordinary shareholders; and an injunction to restrain the company and its liquidator from making any distribution of the assets except upon the footing of such declaration.

The plaintiff now moved for an interim injunction to restrain the defendant company and its liquidator from making any distribution among the ordinary shareholders out of the balance of 22,295*l.* 6*s.* 1*d.* to the credit of the revenue account as on July 26, 1894, or out of any part of the assets of the company being or representing profits earned by the company up to that date, without first paying the arrears of dividend upon the preference shares down to the commencement of the liquidation.

Upon the evidence there appeared to be some doubt—and so his Lordship considered—whether the whole of the 22,295*l.* 6*s.* 1*d.* was, under the particular circumstances of the case—which were somewhat involved and into which it is not now necessary to enter—properly attributable to "revenue" so as to be treated as "profits"; but it was admitted that some portion of that sum was so attributable.

By consent the hearing of the motion was treated as the trial of the action.

Renshaw, Q.C., and *P. S. Stokes*, for the plaintiff. The sum standing to the credit of the revenue account represents undrawn profits, and under the contract into which the company entered by its articles of association the preference shareholders are entitled to be paid their 7 per cent. dividend in priority to any claim of

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the ordinary shareholders: *Wilmer* v. *McNamara & Co.* (1); *Lee* v. *Neuchatel Asphalte Co.* (2); *Verner* v. *General and Commercial Investment Trust* (3); *Mills* v. *Northern Railway of Buenos Ayres Co.* (4); *In re Bridgewater Navigation Co.* (5) If the company were still a going concern, there can be no doubt that these profits would have been applicable in the first instance to payment of the dividend of the preference shareholders, and their right to priority is no way affected by the winding-up. As regards the figures, the accuracy of the accounts for 1893 must, under art. 61, be accepted as conclusive, and cannot now be re-opened.

Warrington, Q.C., and *F. M. S. Cassel*, for the defendant company. As regards the figures, the sum stated as "net revenue" is not correct. The sum properly representing the company's profits or earnings is less than that stated. The account was prepared upon the footing of the company being a going concern; but now that the company is no longer a going concern, such sum as properly stands to the credit of the revenue account should be treated as assets of a company in liquidation, and as applicable in the same manner as the assets of an ordinary trading partnership are applicable under s. 44, sub-s. (*b*), of the Partnership Act, 1890 (53 & 54 Vict. c. 39), that is, first in payment of debts and costs of winding-up, and then in the return to the partners of their paid-up capital. That is not inconsistent with *In re Bridgewater Navigation Co.* (5), where there was more than enough to return all the paid-up capital, and the question arose as to what was to be done after the paid-up capital had been returned, as appears from *Birch* v. *Cropper*. (6) "Profits" can only be ascertained after allowance for loss or depreciation of capital: *Verner* v. *General and Commercial Investment Trust*. (7) That case and *Lee* v. *Neuchatel Asphalte Co.* (2) do not support the plaintiff's contention, for those cases dealt with a company as a going concern, and not, as here, with a company in liquidation. All that those cases

(1) Ante, p. 245.
(2) 41 Ch. D. 1.
(3) [1894] 2 Ch. 239.
(4) L. R. 5 Ch. 621, 631.
(5) [1891] 2 Ch. 317.
(6) 14 App. Cas. 525, 546.
(7) [1894] 2 Ch. 268.

decided was that a company, while a going concern, may properly separate its earnings from its capital. Art. 59 points out how the annual balance-sheet of this company ought to have been prepared.

Renshaw, Q.C., in reply. Possibly it may be true that the rules governing ordinary partnerships apply to a company, but those rules must give way to special engagements or contracts; and if you find, as here, that in the distribution of the assets one partner is entitled to certain preferences or priorities in respect of the profits down to the commencement of the winding-up of the partnership, those rights must be regarded in the distribution: *Griffith* v. *Paget.* (1) It is clear from *In re Bridgewater Navigation Co.* (2) that a company's assets consisting of undrawn profits, if belonging to one class of shareholders, ought to be distributed among the members of that class. I ask your Lordship to do now what the company would have rightly done if it had been a going concern.

KEKEWICH J. The word "profits," like many other words in the English language, and even some of a technical character, is capable of more than one meaning, and it is often, and properly, used in more than one sense; and it seems to me that the two different senses of the word "profits" afford the key to the solution of the difficulty which I have now to deal with. In ordinary parlance, among mercantile men and lawyers, "profits" mean that sum which periodically, at the end of the half-year, or year, or other time fixed by agreement, is divisible among the partners—a term which, of course, includes members of a company—as income. It is sometimes called "net profits," only to distinguish it from what are called "gross profits." It is the sum which is ascertained by the taking of a proper account of what has been made by trading and is therefore distributable between the parties entitled. But the word "profits" is also used properly in this sense: when you come to wind up a concern, you have to pay all the debts; you have to repay to each partner what he has brought in as capital; and after that has all been done, if the concern has been a successful one, there

(1) 6 Ch. D. 511.
(2) [1891] 2 Ch. 317, 329.

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is a balance, and that balance is "profit": it cannot properly be called anything else. Whether you treat it as capital, or whether you treat it as income, is perfectly immaterial. The same persons receive both capital and income, and it is a matter for them to decide in what character they treat it. The best instance of that, because it is a more common one, is a partnership that is concerned in a single transaction, such as the purchase and sale, say, of a ship. The whole business of the partnership is first to purchase, and then, by proper proceedings, to sell the ship. There is no account in the meantime: it is impossible. The capital is found in the first instance. Certain moneys are expended further, beyond the purchase, in negotiating the sale, advertising, and so forth. Then the property is realized, and ultimately you ascertain whether you have a profit or a loss. If you realize more than sufficient to pay all the expenses and return the original purchase-money, then the excess is a "profit."

Those two distinct meanings of the word "profits," and those distinct modes of ascertaining "profits," seem to me to afford the means of determining this case.

I have been referred to several of the cases, including the recent case of *Wilmer* v. *McNamara & Co.* (1), before Stirling J., in which the Courts have had to consider whether a company formed under the Companies Act, 1862, may properly divide in a given year or half-year the income made, as profit, when, notwithstanding the income yielded, the property has either depreciated in value or has been destroyed; and the Courts have decided, on consideration of the Acts of Parliament governing such companies, and in connection with the principles which govern commercial men, that that may be done—that it is open to the company so to decide. What will happen in the winding-up of such a company does not come into consideration there at all. If the profit has once been divided according to the articles of association and according to law, it of course cannot be recouped. The division of profits at the end of any year or half-year, or other period, does not affect the ultimate winding-up of such a company, and it does not enter into the consideration

(1) Ante, p. 245.

of any judgment on the point. For that purpose, of course, in order to find out whether there is a profit, you must state your account according to proper principles and according to the articles of association—if you have a direction to that effect, as is the case here. But when a company comes to liquidation, you must state your account possibly on an entirely different footing: certainly, you must state it with reference to the articles of association as if they were the sole guide. The object, then, is to ascertain once for all—and, as has been pointed out in one of the cases, not with reference to estimates, but with reference to realized results—what the assets are; and then, when you have got in everything, and paid everything, you ascertain what the profit is, and that is the profit divisible among the shareholders or partners, as the case may be, according to the constitution of the particular partnership. That profit you cannot ascertain until you have repaid to the shareholders or partners their capital. I am asked to deal with the present case on that footing.

Now here, in taking the account, it has been ascertained that there is a certain sum which might have been divided before the liquidation, a sum which is not "profit" in the second sense which I have just mentioned, but which was profit last year or the year before, and is what is called "undrawn profits," or, perhaps, what, as regards a company, as distinguished from a partnership, would be more accurately called undistributed or undivided profits. What are you to do with them? Are they the less "profits" because they have not been divided? Mr. Warrington says that, according to the cases, these profits might have been divided; but no case says they shall be divided, or shall be deemed to have been divided: that is a matter of discretion. True, I am not here considering a report of the directors recommending a dividend, or a balance-sheet shewing divisible profits; nor am I considering the resolution of a general meeting declaring a certain dividend. If so, I should of course only have to act upon that—to see that the declaration had been properly made, and then determine that the division should follow the declaration. I have nothing of that kind here. But what I have is, that before the liquidation—that is to say, while

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the company was still a going concern—certain profits were realized, and that those profits have come to the hands of the liquidator. What is he to do with them? Are they to go into the general mass and be treated merely as assets in the liquidation; or are they to be still considered as "profits," though up to this time undivided?

I do not myself see any answer to the claim of the preference shareholders that the profits should be applied in the first place in paying a dividend of 7 per cent. upon their shares, and in priority to everything else. Now that the powers of the directors to recommend, and the power of a general meeting to declare, a dividend are at an end, it seems to me that the rights of the preference shareholders still remain, and are still enforceable, because those rights are declared by the memorandum of association, or in other words by the contract into which the different classes of shareholders have entered. That appears to me to be strictly in accordance with what was said by the Master of the Rolls in *Griffith* v. *Paget* (1)—strictly in accordance with the principles of contract; and I see nothing in the other cases to prevent it.

I think, therefore, the view of the preference shareholders must prevail, and, as the parties have agreed to treat this motion as the trial of the action, there will be a declaration that the plaintiff and the other preference shareholders are entitled to be paid their arrears of dividend up to the date of the commencement of the liquidation, July 16, 1894, out of such part of the assets of the company (without specifying the exact figures, as to which I am not at all satisfied) as represents profits earned by the company up to that date.

Warrington, Q.C. With regard to the costs, an arrangement has been come to between the parties that they should come out of the assets.

KEKEWICH J. That is quite right: they are liquidation expenses really.

Solicitors: *Parker, Garrett & Parker; Bircham & Co.*

(1) 6 Ch. D. 511.

G. I. F. C.

HUDDERSFIELD BANKING COMPANY, LIMITED *v.* HENRY LISTER & SON, LIMITED.

C. A. 1894

VAUGHAN WILLIAMS J. *Nov.* 5, 6.

C. A. 1895 *April* 26, 27, 29.

[1893 H. 4153.]

Consent Order—Jurisdiction to Set Aside—Mistake—Mortgagor and Mortgagee.

The Court has jurisdiction to set aside a consent order upon any ground which would invalidate an agreement between the parties.

A consent order which had been completed and acted upon, but without affecting interests of third parties, set aside by the Court upon the ground of common mistake.

Gough v. *Wood* ([1894] 1 Q. B. 713) explained.

Appeal from Vaughan Williams J.

By certain indentures of mortgage dated in and prior to 1889, Henry Lister, a manufacturer, mortgaged to the Huddersfield Banking Company certain leasehold mills near Huddersfield, and all the fixed plant and machinery then or thereafter to be brought on and affixed to the mortgaged premises.

In May, 1890, the business and assets of Henry Lister, including the equity of redemption in the mortgaged premises, were acquired by and transferred to the defendant company, Henry Lister & Son, Limited.

On January 16, 1892, a petition was presented for the winding up of the defendant company.

On January 20, 1892, a debenture-holders' action was commenced against the defendant company, and on the same day the official receiver in companies' liquidation was appointed receiver on behalf of the debenture-holders, and also to manage and work the company's business. The banking company were not parties to that action.

On January 30, 1892, an order was made for the winding up of the defendant company, under which the official receiver became the liquidator.

The banking company claimed to be entitled, by virtue of their mortgages, to certain machinery on the mortgaged premises, and by arrangement an inspection of such premises was made by a Mr. Tinker on behalf of the banking company, and by a

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Mr. Taylor on behalf of the liquidator and receiver and in the interest of the parties to the debenture-holders' action, when it appeared that the machinery and effects on the premises consisted in part of thirty-five fast-power looms, thirty-three of which appeared not to be attached to the mills.

On October 11, 1892, a summons was taken out by the plaintiffs in the debenture-holders' action for an order that the patent rights and machinery and plant, the property of the defendant company, upon their mills, and specified in the schedule to an affidavit filed in support of the summons, might be sold with the approbation of the judge. The affidavit in support of the summons referred to the items in the schedule as "admittedly loose machinery," and the schedule included the thirty-three fast-power looms above mentioned. This summons was served upon the Huddersfield Banking Company. They attended at the hearing of it, and with their consent, on October 17, 1892, an order was made in the terms of the summons for the sale of the machinery and plant and the patent rights of the defendant company. This order was duly passed and entered; and in November, 1892, the thirty-three fast-power looms were sold, realizing the net sum of 1131*l.* This sum was received by the official receiver and still remained in his hands.

The banking company, as they alleged, afterwards ascertained that the thirty-three fast-power looms were purchased by Henry Lister & Son at various dates during 1889 and 1890, and were upon delivery affixed to the mills so as to become part of the property comprised in the mortgage security, and remained so until February, 1892, when they were wrongfully loosened and severed from the premises. The banking company accordingly, on November 28, 1893, brought this action against the defendant company, the liquidator, and the plaintiffs in the debenture-holders' action, alleging that the arrangement in relation to the ownership of the thirty-three looms was agreed to, and the consent of the banking company to the order of October 17, 1892, was given under a mistake as to material facts; and they claimed a declaration that the thirty-three looms were, at the date of the arrangement, the order, and the sale, their own property as mortgagees, together with orders to set aside the arrangement

and assent, and for the payment to themselves of the proceeds of the sale with interest at 4 per cent. It was admitted that the other two fast-power looms were affixed to the premises and belonged to the plaintiffs in this action. The two principal questions which arose in the action were—(1.) whether, as a matter of fact, the thirty-three looms were affixed to the mill, and included in the mortgage to the plaintiffs; and (2.) whether the consent order of October 17, 1892, could be set aside. The former question does not call for a report.

The action was tried before Vaughan Williams J. on November 5, 6, 1894.

Cooper Willis, Q.C., and *L. A. Kershaw*, for the bank.
Farwell, Q.C., and *Alexander Young*, for the defendants.

1894. Nov. 6. VAUGHAN WILLIAMS J. delivered judgment, in which, after stating the facts, he proceeded as follows:—

In this state of things, the first question which I have to determine is whether I have power to set aside the order, or "arrangement and order," at this date and on the grounds alleged.

I am of opinion that, assuming the facts alleged to be true, the Huddersfield Banking Company are entitled to relief. For the purpose of disposing of the objection, in the nature of a demurrer, which has been raised, I have to assume that the arrangement whereby the thirty-three machines were dealt with as belonging, not to the banking company, but to the receiver and liquidator, was arrived at by the common and mutual mistake of the parties; and it seems to me that the law would be in a very lamentable condition if an order and arrangement based upon such a mistake could not be put right by the Court, especially at a time when nobody has been injured by what has passed, and nobody will be injured by the mistake being corrected.

It is true that the property has been sold and now exists as money; but that is all that has happened: and is the fact that the property has been turned into money to stand in the way of the Court's dealing with the proceeds of sale according to the

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true rights of the parties, now that the common mistake has been discovered? When this matter was brought before me on motion, I thought that the authorities prevented me from putting the matter right on an application in that form, and I am still of the same opinion. But, now that an action has been brought and the technical difficulty has been removed, it seems to me that the clear result of the authorities is that, notwithstanding the consent order has been drawn up and completed, and acted upon to the extent that the property has been sold and the money has been paid into the hands of the receiver, I may now set aside the order and arrangement upon any ground which would justify me in setting aside an agreement entered into between the parties.

The real truth of the matter is that the order is a mere creature of the agreement, and to say that the Court can set aside the agreement—and it was not disputed that this could be done if a common mistake were proved—but that it cannot set aside an order which was the creature of that agreement, seems to me to be giving the branch an existence which is independent of the tree. Under the circumstances, I have come to the conclusion that I can set aside the order, and give effect to what are the true rights of the parties.

It is however contended that, although I might otherwise be able to set aside the order and agreement on the ground of this mistake, I cannot do so, for two reasons specially applicable to this case—(1.) because the mistake, it is said, resulted from the fraud of persons who are not before the Court, and *Duranty's Case* (1) is an authority which binds me on that part of the case; and (2.) because the agreement upon which the order was based was itself a compromise of doubtful rights.

The decision in *Duranty's Case* (1) merely comes to this. The directors of a banking company which was in difficulties made a report to the shareholders and the public of the financial condition of the company, and that report induced a person to purchase shares in open market from a third person. After his name had been registered in the books of the company, it turned out that the report was altogether untrue and without foundation,

(1) 26 Beav. 268.

and, the company having stopped payment, it was held that the purchaser was a shareholder and liable as a contributory. In other words, the representation having been made by the directors, who were not parties to the contract of purchase, the purchaser who has chosen to act upon the representation cannot get rid of his purchase on the ground that the representation involved a misstatement of fact. But *Duranty's Case* (1) seems to me to be a very long way off the proposition which was sought to be based on it in the argument of the case before me. I believe that the law is that if a party has been induced by a mistake common to both parties to consent to a decree or order, the Court has power to relieve him, and will do so on being satisfied that the mistake existed, and that the conduct of the party himself has not deprived him of the title to relief, and that relief can be given with a due regard to the just rights of others. It is alleged that the arrangement upon which the consent order was based was arrived at because both parties, forming a judgment from the state of things which they saw through the eyes of Mr. Taylor and Mr. Tinker respectively—namely, that the machines were not then in any way fixed to, but merely resting of their own weight on the floor of the mill—were under a mistake, because they supposed that the state of things then seen had always existed, whereas in truth and in fact the machines had been fixed until either just before or just after the commencement of the liquidation—I do not think it makes any difference which. It is said that that mistake, in fact, induced Mr. Taylor and Mr. Tinker to deal with the machines as they did, and that this alteration in the condition of the machines was brought about through the fraud of the Messrs. Lister. To my mind, it is immaterial whether it was or was not brought about by their fraud. If the mistake was in fact made, it seems to me to be immaterial how the parties came to make it. *Duranty's Case* (1) is cited as an authority to the contrary; but I do not regard that case as meaning that, although such a mistake had been made as would entitle the Huddersfield Banking Company to relief if it was not known how the state of things arose which led to the mistake being made, yet there is no title to relief if

(1) 26 Beav. 268.

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you can shew that the state of things which led to the mistake was brought about by the act, whether fraudulent or otherwise, of somebody who is not a party to the action.

It seems to me that if once I find that at the time of the inspection being made there was a mistake in fact as to what the condition of the machines had been at all material times, that is sufficient to enable me to set aside this arrangement, whether the external appearance of things which existed when the inspection was made was or was not brought about by the act of Messrs. Lister.

As regards the other matter relied on as a ground for not giving relief, I agree that if the arrangement come to was a compromise of doubtful rights and a give-and-take arrangement, parties to it could not afterwards have the compromise set aside because upon obtaining fuller information they thought they had made a bad bargain. But, having regard to the evidence, I am of opinion that this arrangement was not a compromise or give-and-take arrangement of the sort I have referred to. The arrangement was not that one side should give way as to some of the machines and the other side as to the rest of them; and that being so, I have nothing further to dispose of before I deal with the question whether the machines were included in the mortgage.

[His Lordship then dealt with the question last mentioned, and decided it in the plaintiffs' favour.]

F. E.

C. A.

The defendants appealed. The appeal came on for hearing on April 26, 1895.

Farwell, Q.C., and *W. R. Sheldon*, for the defendants. A consent order is as binding upon the parties as any other order: Daniell's Chancery Practice, 6th ed. vol. i. p. 687. It is an estoppel, and cannot be set aside when once acted upon.

[KAY L.J. It was held as long ago as *Bradish* v. *Gee* (1) that a party cannot appeal from a decree made by consent.]

And still earlier in *Webb* v. *Webb*. (2) A consent order is equivalent to a judgment between the parties: *In re South*

(1) Amb. 229. (2) 3 Swans. 658.

American and Mexican Co. (1); and to set aside a judgment you must prove fraud: *Flower* v. *Lloyd* (2); *Abouloff* v. *Oppenheimer* (3); *Vadala* v. *Lawes.* (4)

[KAY L.J. In *Attorney-General* v. *Tomline* (5) Fry J. said a consent order, when drawn up, passed, and entered, could not be set aside except for reasons which would enable the Court to set aside an agreement.]

Attorney-General v. *Tomline* (5) is an authority in our favour. A completed agreement cannot be set aside on the ground of a mistake induced by the representations of an outsider. It can only be set aside on the ground of fraud or concealment of material facts with the knowledge of their materiality: *Duranty's Case.* (6) Again, this consent order was part of a compromise between the parties, a give-and-take arrangement by which Lister & Co. were to give up to the banking company the two looms which were screwed down and were to take the other thirty-three. And a compromise, whether made under an order of the Court or by agreement, can only be set aside on the ground of fraud, such as where facts known to one party are kept concealed from the other: *Brooke* v. *Lord Mostyn.* (7) *Clayton* v. *Leech* (8) and *Okill* v. *Whittaker* (9) are instances in which the Court has refused to set aside contracts on account of mistake.

[Upon the question of relieving parties from consent orders, compromises, or other bargains on the ground of fraud, mistake, ignorance of material facts, or misapprehension of rights, the Court referred to *Bloomer* v. *Spittle* (10), *Davenport* v. *Stafford* (11), *Trigge* v. *Lavallée* (12), and *Bingham* v. *Bingham.* (13)]

As to *Bingham* v. *Bingham* (13), the ground of the decision was total failure of consideration: Dart's Vendors and Purchasers, 6th ed. p. 907. Moreover, there has been acquiescence on the part of the banking company. [They cited upon the question of common mistake, *Garrard* v. *Frankel* (14) and *Harris* v.

(1) [1895] 1 Ch. 37.
(2) 10 Ch. D. 327.
(3) 10 Q. B. D. 295, 307–8.
(4) 25 Q. B. D. 310, 316.
(5) 7 Ch. D. 388.
(6) 26 Beav. 268; 28 L. J. (Ch.) 37.
(7) 2 D. J. & S. 373, 416.
(8) 41 Ch. D. 103.
(9) 2 Ph. 338.
(10) L. R. 13 Eq. 427.
(11) 8 Beav. 503, 522.
(12) 15 Moo. P. C. 270, 298–9.
(13) 1 Ves. Sen. 126.
(14) 30 Beav. 445.

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Pepperell (1); and upon representation and concealment, *Brownlie* v. *Campbell* (2); and they also contended that a mortgagor while in possession might remove chattels of which he was left in possession, although they might be of such a character that when the mortgagee took possession they would be treated as fixtures: *Cumberland Union Banking Co.* v. *Maryport Hæmatite Iron and Steel Co.* (3); *Gough* v. *Wood.* (4)]

Cooper Willis, Q.C., and *L. A. Kershaw, Q.C.*, for the respondents, the Huddersfield Banking Company, were not called upon.

LINDLEY L.J. Messrs. Lister & Son, Limited, the appellants, contend that there is no jurisdiction to set aside the consent order upon such materials as we have to deal with; and they go so far as to say that a consent order can only be set aside on the ground of fraud. I dissent from that proposition entirely. A consent order, I agree, is an order; and so long as it stands it must be treated as such, and so long as it stands I think it is as good an estoppel as any other order. I have not the slightest doubt on that; nor have I the slightest doubt that a consent order can be impeached, not only on the ground of fraud, but upon any grounds which invalidate the agreement it expresses in a more formal way than usual.

If authority for this be wanted, it will be found in two cases which were referred to in the course of the argument, and which I do not propose to examine at any length—I mean *Davenport* v. *Stafford* (5) and *Attorney-General* v. *Tomline.* (6) To my mind, the only question is whether the agreement upon which the consent order was based can be invalidated or not. Of course, if that agreement cannot be invalidated the consent order is good. If it can be, the consent order is bad.

Now, on the question of jurisdiction let us see what there is against setting aside the agreement. How does that stand? The agreement in this case has been carried out, and under it the receiver has sold certain property and has received the purchase-money. But I take it that an agreement founded upon a

(1) L. R. 5 Eq. 1.
(2) 5 App. Cas. 925.
(3) [1892] 1 Ch. 415.
(4) [1894] 1 Q. B. 713.
(5) 8 Beav. 503.
(6) 7 Ch. D. 388.

common mistake, which mistake is impliedly treated as a consideration which must exist in order to bring the agreement into operation, can be set aside, formally if necessary, or treated as set aside and as invalid without any process or proceedings to do so. In point of law, the moment you have got rid of the consent order, it is quite plain that an action would lie at law for money had and received at the instance of the bank against the receiver upon the ground of the mutual mistake; or, rather, as it would be put in law, a total failure of consideration. If authority for that be wanted, the cases will be found collected in the ordinary books on contract; but in particular *Strickland* v. *Turner* (1) is one of them. That case related to the sale of an annuity by trustees. The annuitant had died shortly before the sale was effected, but the death was unknown to the purchaser, who paid over his purchase-money. He afterwards brought an action to recover it back, and his success was a matter of course.

On the same principle, there are cases in equity, of which *Bingham* v. *Bingham* (2) may be referred to as a leading example in which an agreement to purchase a property was set aside and the money restored, upon the ground that the property really belonged to the man who had professed to buy it. It was a common mistake, and the transaction was set aside. I am aware that *Bingham* v. *Bingham* (2) has been occasionally criticised, and in some of the earlier editions of Lord St. Leonards' book on Vendors and Purchasers he seemed to think there was something wrong about it. In his later editions, however, he changed his opinion; and *Bingham* v. *Bingham* (2) was carefully examined in the House of Lords in *Cooper* v. *Phibbs* (3), and was distinctly affirmed. The principle of it was assented to and laid down to be correct; and in a still later case of *Jones* v. *Clifford* (4) Hall V.-C. again went through the whole of the cases relied on, and came to the conclusion that *Bingham* v. *Bingham* (2) was sound law. As I understand the case, I cannot conceive on what ground there should be any question of its soundness. It appears to me to be in perfect accordance with well-settled

(1) 7 Ex. 208.
(2) 1 Ves. Sen. 126.
(3) L. R. 2 H. L. 149.
(4) 3 Ch. D. 779.

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principles of law, both of this country and of all civilised countries, as far as I know. In the case now before the Court there is, as far as I can see, no difficulty in getting rid of the consent order or of the agreement under which the receiver received the money. For the agreement was based upon a mistake of fact common to both parties, the mistake being that both parties thought and believed that these thirty-three looms never had been fixed at all, whereas in fact they had.

Now I pass to another point, which was made by Mr. Sheldon. He said this was a compromise. He says there were thirty-five of these looms, and the real arrangement was, not that the thirty-three should be sold upon the common mistake I have alluded to, but that there was a give-and-take arrangement that, if Lister & Son gave the bank the two which were "screwed down," Lister & Son were to have the remaining thirty-three. If that had been the true arrangement, the aspect of the transaction would have been totally different; but this part of the case was carefully considered by Vaughan Williams J., who made a finding upon it; and, having regard to the evidence that there never was any such give-and-take arrangement at all, it would be impossible to adopt that view of the transaction. There was no compromise at all. It was simply an oversight.

Then it was said, supposing that be so, then these looms were unfixed before the mortgagees took possession; and on the authority of *Cumberland Union Banking Co.* v. *Maryport Hæmatite Iron and Steel Co.* (1) and *Gough* v. *Wood* (2), that is sufficient, and the mortgagees cannot claim. The answer to that is this: These cases turned on the view, right or wrong—I do not pause to consider that now—that the chattels were unfixed, and properly unfixed, on the implied authority given by the mortgagees. It is impossible to say these were unfixed by the implied authority given by the mortgagees; they were not unfixed in the ordinary course of trade or anything of that kind; but they were unfixed really on purpose to prevent the mortgagees from claiming them. The proposition as to inferring an authority on the part of the mortgagees, or an implied authority on the part of the mortgagees, to unfix them, or to come to the

(1) [1892] 1 Ch. 415. (2) [1894] 1 Q. B. 713.

conclusion that they were unfixed in the ordinary course of trade for the purpose of being replaced by others, is untenable. *Gough* v. *Wood* (1) really does not apply to the case at all.

The appeal breaks down in every direction, and must be dismissed with costs.

LOPES L.J. I am of the same opinion. Two questions arise in this case. The first is, Can the Court set aside a consent order which has been passed and drawn up; and, secondly, are these thirty-three looms fixtures? I will deal first with the question whether they are fixtures, because if the looms are not fixtures the consent order would be right—there would have been no mutual or common mistake. Are the thirty-three looms fixtures? The learned judge found they were so fixed to the freehold as to become part of it. I am of opinion the learned judge was right. [The Lord Justice then considered the evidence on this point, and continued:—]

Then it is said there was a consent order, which was drawn up and passed, and that the Court has no jurisdiction to set it aside. Now, it appears to me that two of the cases which have been cited are sufficient authority to shew that it can be set aside—namely, *Davenport* v. *Stafford* (2) and *Attorney-General* v. *Tomline*. (3) The law seems to be that a consent order may be set aside for the same reasons as those on which an agreement may be set aside. It appears to me that when once a common mistake is established you can set aside an agreement. It cannot be contended here, I think, that there was not a common mistake. It was, as I understand, admitted that both parties honestly believed that these thirty-three looms were loose chattels at the time the consent order was made. But then it is said that, having regard to the true nature and character of this transaction, it was a compromise. Now the order, to my mind, points in the other direction. I rather conclude that the true transaction was this: one party was satisfied that the two looms were fixed to the soil, and the other party was satisfied that the thirty-three were not fixed to the soil; and, acting on that

(1) [1894] 1 Q. B. 713. (2) 8 Beav. 503.
(3) 7 Ch. D. 388.

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belief merely, not in any give-and-take way, they proceeded to this consent order.

I have come to the conclusion, therefore, that the learned judge was right in his judgment in every respect, and I therefore think the appeal should be dismissed.

KAY L.J. I will add a few words on my own behalf, because one of the questions raised in this case is of very considerable importance. It was denied in argument that the Court had any jurisdiction whatever to set aside a consent order except in the case of fraud.

Now, what is this consent order? After all, it is only the order of the Court carrying out an agreement between the parties. Supposing the order out of the way and the agreement only to exist, there can be no sort of doubt that the agreement could be set aside, not merely for fraud, but in case it was based upon a mistake of material fact which was common to all the parties to it. Then, if it could be set aside on that ground, why should the Court be unable to set it aside simply because an order has been founded upon it? It seems to me that, both on principle and on authority, when once the Court finds that an agreement has been come to between parties who were under a common mistake of a material fact, the Court may set it aside, and the Court has ample jurisdiction to set aside the order founded upon that agreement. Of course, if the order had been acted upon, and third parties' interests had intervened and so on, difficulties might arise; but nothing of that kind occurs here. Here we have got simply the parties to this agreement and order before us. No one else seems to have obtained any kind of interest under it; and therefore, if it be made out that the order proceeded upon the common mistake of a material fact, there is ample jurisdiction in the Court to set it aside.

Now, the only bodies or persons who were parties to this agreement and this consent order were the original mortgagees and the subsequent debenture-holders. The question was, which of the looms on the mortgaged property were in the nature of fixtures. It was agreed that two were, and it was agreed that thirty-three were not; but as to the thirty-three there does not

seem to have been any dispute or contest whether they were fixtures or not. Experts went down and examined what the condition of things was, and found that these thirty-three looms were completely loose. Therefore, they came to the conclusion that they never had been fixed, and these looms were not treated as fixtures at all. That was not the fact. The fact was that they had been fixtures just as much as the two that were treated as fixtures. On the whole, I think the learned judge came correctly to the conclusion that they had been, owing to the manner in which they were fixed to the floor, as much fixtures as the two which it was agreed must be treated as fixtures.

[The Lord Justice then dealt with the contention that, although these looms might have become fixtures, they were never affixed to the mills with the authority of the mortgagors who were in possession, and, after considering the evidence upon this point, came to the conclusion that beyond the possibility of reasonable question they were fastened down by the authority of the mortgagors. His Lordship then continued:—]

I therefore think there was a mistake of a material fact which was common both to the mortgagees and to the debenture-holders between whom this agreement was made, and on whose behalf this consent order was made. The mortgagees were induced to consent by ignorance of this material fact, which also the other side were ignorant of. That seems to me to give the Court jurisdiction to set aside the agreement based upon a common mistake of a material fact, and consequently to set aside the order which was founded upon it.

But then it was argued that this was a compromise. Now, what constitutes a compromise? A compromise takes place when there is a question of doubt and the parties agree not to try it out, but to settle it between themselves by a give-and-take arrangement. I quite agree that if this was a case of that kind it would be extremely difficult to interfere with the order. But was there ever any doubt as to these thirty-three looms? Did either of the parties consider they were fixtures? They did not. There never was any such doubt at all, and therefore there certainly was no settlement of any doubt of that kind. I cannot

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see that in this case there is any element of a compromise. It seems to me that that argument also fails.

Then the cases of *Gough* v. *Wood* (1) and the *Cumberland Union Banking Co.* v. *Maryport Hæmatite Iron and Steel Co.* (2) were referred to as if the thirty-three looms had at one time been fixtures, yet before the mortgagees took possession the mortgagors had a right to remove them. As between mortgagor and mortgagee, I simply dissent from that proposition; and if the case of *Gough* v. *Wood* (1) is examined it will be found that it proceeded absolutely and entirely upon this, that from the circumstances of that particular case the mortgagees must be taken to have assented to that which the mortgagors did in removing the fixtures before they took possession. Here there is no pretence for saying that. This was not a removal of the looms in the course of the trade of the mortgagors and as a legitimate act of that trade. The analogy in the case of *Gough* v. *Wood* (1) was that of a nurseryman who, in carrying on his business of a nurseryman, removed trees which had been planted in the soil for the purpose of selling them, and converted them into chattels and sold them. That would be a proper thing to do in the course of carrying on his business. But there is nothing of that kind here. Therefore I think those cases do not support the argument attempted to be founded upon them. On the whole, I agree with the decision of the learned judge in the Court below. I think this appeal fails, and that it must be dismissed with costs.

Solicitors: *Ramsden, Radcliffe & Co., for Ramsden, Sykes & Ramsden, Huddersfield*; *Iliffe, Henley & Sweet, for Laycock, Dyson & Laycock, Huddersfield.*

(1) [1894] 1 Q. B. 713. (2) [1892] 1 Ch. 415.

W. W. K.

In re MERSEY RAILWAY COMPANY.

C. A. 1895 May 1, 2.

Company—Debenture Stock—Borrowing Powers—Priority—Companies Clauses Act, 1863 (26 & 27 *Vict. c.* 118), *ss.* 22, 24—*Railway Companies Act*, 1867 (30 & 31 *Vict. c.* 127), *s.* 24.

The 24th section of the Companies Clauses Act, 1863, which enacts that the holders of debenture stock shall not as among themselves be entitled to any priority, applies only to debentures issued under the same special Act, and not to all debentures issued by the same company.

The 24th section of the Railway Companies Act, 1867, which empowers railway companies to issue debenture stock subject to the provisions of Part III. of the Companies Clauses Act, 1863, applies to all railway companies which have power to raise money by mortgage or bond, although their special Act does not incorporate Part III. of the Companies Clauses Act, 1863.

By the Mersey Railway Act, 1866 (29 & 30 Vict. c. cxxxix.), the Mersey Railway Company was empowered to borrow 116,600*l.* on mortgage or debenture stock as soon as the whole capital of 350,000*l.* had been subscribed for and half paid up. This Act incorporated Part III., relating to debentures, of the Companies Clauses Act, 1863.

By the Mersey Railway Act, 1871 (34 & 35 Vict. c. cci.), the company were authorized to borrow 100,000*l.* additional on mortgage; but by s. 38 it was provided that no part was to be borrowed until the whole additional capital of 300,000*l.* was subscribed for, issued, and accepted, and one-half thereof was paid up, and the company had proved to the justice who was to certify under s. 40 of the Companies Clauses Consolidation Act, 1845, before he so certified, that the whole of that capital had been subscribed for, issued, and accepted, and that one-half thereof had been paid up, and that certain other conditions therein mentioned had been fulfilled; and the justice was to grant a certificate that such proof had been given. No power was given by this Act to issue debenture stock; and it did not incorporate Part III. of the Companies Clauses Act, 1863.

By a third special Act, the Mersey Railway Act, 1882 (45 & 46 Vict. c. cclviii.), which incorporated Part III. of the Companies Clauses Act, 1863, the company were empowered to borrow

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90,000*l.* on mortgage, but not till the additional share capital of 270,000*l.* had been subscribed for and one-half paid up. By s. 44, "All mortgages granted by the company in pursuance of the powers of any Act of Parliament before the passing of this Act" are to "have priority over any mortgages granted by virtue of this Act, but nothing in this section contained shall affect any priority of the interest of any debenture stock at any time created and issued by the company." Sect. 46 was as follows: "The company may create and issue debenture stock, subject to the provisions of Part III. of the Companies Clauses Act, 1863, but, notwithstanding anything therein contained, the interest of all debenture stock and of all mortgages at any time after the passing of this Act created and issued or granted by the company under this or any subsequent Act shall, subject to the provisions of any subsequent Act, rank pari passu (without respect to the dates of the securities or of the Acts of Parliament or resolutions by which the stock and mortgages were authorized), and shall have priority over all principal moneys secured by such mortgages."

Subsequent Acts were passed in 1883, 1884, 1885, 1886, 1887, and 1888 giving additional borrowing powers to the company. By the last-mentioned Act the company were empowered, with the sanction of the holders of existing debenture stock, given in manner therein mentioned, to raise 360,000*l.* in Redeemable First Debenture Stock, to be a first charge as to both principal and interest on the company's undertaking.

The company were not in a position to exercise any of their borrowing powers till the year 1883; but on April 19 of that year a resolution was passed at a special general meeting by which the directors were authorized to issue debenture stock for the whole or any portion of the money which they were authorized by their several special Acts to raise on mortgage or bond.

A prospectus was accordingly issued, which contained the following announcement: "First issue of 116,600*l.* perpetual debenture stock, bearing interest at 5 per cent. per annum, at par, being a portion of the borrowing powers authorized under the Acts 1866, 1874, and 1882." It was admitted that "1874" was a misprint for 1871. The company afterwards issued deben-

ture stock at 4½ per cent. for a further sum of 100,000*l.* which was expressed to be issued under the Act of 1871, and also 4½ per cent. debenture stock for 360,000*l.* under the subsequent Acts.

A petition was presented by debenture stock holders of the issue of 100,000*l.* under the Railway Companies Act, 1867, under which receivers and managers of the undertaking were appointed, and inquiries were directed as to the priorities of the various classes of debenture stock holders.

The chief clerk found that the order of priority was as follows: First, the issue of 116,600*l.*; secondly, the issue of 100,000*l.*; thirdly, the issue of 360,000*l.*

The Debenture Corporation, which held 220,000*l.* of the issue of 360,000*l.*, moved to vary this certificate, contending (1.) that by virtue of s. 24 of the Companies Clauses Act, 1863, all the holders of debenture stock of the company, under whichever Act the stock was issued, ought to rank pari passu, and (2.) that the issue of 100,000*l.* was invalid, because the Act of 1871 gave no power to issue debenture stock. They also contended (3.) that the issue of 116,600*l.* debenture stock was at all events invalid to the extent of 50,000*l.* by reason of a prior agreement with a Major Isaacs, which made it an over-issue to that extent; and (4.) that the item 100,000*l.* was invalid to the extent of 10,000*l.*, which had been borrowed before the certificate of a justice had been obtained that the proper amount of capital had been subscribed for.

Stirling J. overruled all these objections; and the Debenture Corporation appealed. (1)

(1) The sections of the Companies Clauses Act, 1863 (26 & 27 Vict. c. 118), and the Railway Companies Act, 1867 (30 & 31 Vict. c. 127), specially referred to in the argument were the following:—

26 & 27 Vict. c. 118, Part III., s. 22: "Where any company, incorporated either before or after the passing of this Act for the purpose of carrying on any undertaking, is authorized by any special Act hereafter passed, and incorporating this part of this Act, to create and issue debenture stock, then and in every such case the company . . . may from time to time raise all or any part of the money which for the time being they have raised, or are authorized to raise, on mortgage or bond, by the creation and issue at such times, in such amounts and manner, on such terms, subject to such conditions, and with such rights and privileges, as the company thinks fit, of stock to be called debenture stock, instead of and to the same amount as

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Buckley, Q.C., and *Theobald*, for the appellants. The terms of the 24th section of the Companies Clauses Act, 1863, are distinct that the holders of debenture stock shall not among themselves be entitled to any preference or priority. It might have been different if the powers of the various Acts had been acted upon at the time and in the order in which they were granted —if the company had issued debenture stock under the Act of 1866 and again under the Act of 1871 before they issued stock under the Act of 1882. But this was not done; the stock under all the Acts was issued practically at the same time. In this respect the case differs from *Harrison* v. *Cornwall Minerals Ry. Co.* (1) The Act of 1871 did not authorize the company to borrow money on debenture stock, nor did it incorporate

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the whole or any part of the money which may for the time being be owing by the company on mortgage or bond, or which they may from time to time have power to raise on mortgage or bond, and may attach to the stock so created such fixed and perpetual preferential interest, not exceeding the rate prescribed in the special Act, and if no rate is prescribed, then not exceeding the rate of £4 per cent. per annum payable half yearly or otherwise, and commencing at once, or at any future time or times, when and as the debenture stock is issued, or otherwise, as the company thinks fit."

Sect. 23 enacts that debenture stock with the interest thereon shall be a charge upon the undertaking of the company prior to all shares and stock of the company.

Sect. 24: "The interest on debenture stock shall have priority of payment over all dividends or interest on any shares or stock of the company, whether ordinary or preference or guaranteed, and shall rank next to the interest payable on the mortgages or bonds for the time being of the company legally granted before the creation of such stock; but the holders of debenture stock shall not, as among themselves, be entitled to any preference or priority."

30 & 31 Vict. c. 127, s. 24: "Any company may create and issue debenture stock, subject to the provisions of Part III. of the Companies Clauses Act, 1863 (relating to debenture stock), and the said Part III. shall, with respect to any special Act of a company incorporating that part, whether passed or to be passed, be read and have effect as if the following words, that is to say, 'not exceeding the rate prescribed in the special Act, and if no rate is prescribed then not exceeding the rate of £4 per cent. per annum,' had not been inserted in s. 22 of that Act; and for the purposes of the present section this Act shall be deemed a special Act passed (2) incorporating that part; and any special Act of a company passed before the passing of this Act prescribing any rate shall be read and have effect as if no rate had been prescribed therein."

(1) 18 Ch. D. 334; 8 App. Cas. 780.

(2) *&c.*

Part III. of the Companies Clauses Act, 1863, therefore the issue of 100,000*l.* debenture stock under the Act of 1871 was invalid. We also contend that as to 10,000*l.* part of the issue of the 100,000*l.* debenture stock was invalid because the certificate of a justice was not first obtained as to the proper amount of capital having been subscribed: *Fountaine* v. *Carmarthen Ry. Co.* (1); *Landowners' West of England Land Drainage and Inclosure Co.* v. *Ashford* (2); and that there has been an over-issue of 50,000*l.* of debenture stock under the Act of 1866.

Beale, Q.C., and *Edward Ford*, for the holders of 50,000*l.* of the 5 per cent. debenture stock.

Haldane, Q.C., and *Macnaghten*, for the holders of 66,600*l.* of the 5 per cent. debenture stock.

Butcher and *Austen-Cartmell*, for the petitioners and other holders of the 100,000*l.* 4½ per cent. debenture stock.

The counsel for the respondents were not called on.

LINDLEY L.J. Having had the opportunity of considering what Mr. Buckley said yesterday, and what Mr. Theobald said this morning, we really do not feel any difficulty in this case.

The question raised is, of course, one of importance to the holders of debenture stock in this particular company, but I do not propose to go through the Acts at any length. It seems to me not to be open to the objections which have been raised. The company was formed under a special Act of Parliament, and it had borrowing powers under three sets of Acts. The first was the Act of 1866, which was a special Act which authorized them to borrow 116,600*l.* The next special Act authorized them to borrow 100,000*l.* Then came the third Act of 1882, which was followed by others, to which it is unnecessary for me to refer, which empowered the company to borrow still further sums.

Now, the first Act of 1866 enabled them to borrow 116,600*l.* on debenture stock. There is no question at all about that, and they did borrow 116,600*l.* upon debenture stock. But it is said that 50,000*l.* of that amount was over-issued, and that is one of the points which we have now to consider. I will pass over that for a moment.

(1) L. R. 5 Eq. 316. (2) 16 Ch. D. 411.

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The second Act of 1871 authorized them to borrow 100,000*l.*, but it did not say by debenture stock, and the point arises as to whether the debenture stock issued in respect of the 100,000*l.* authorized to be raised by this Act is valid. That is another point. Under that same Act of Parliament, it is alleged that 10,000*l.* at any rate was over-issued, and that, as to that debenture issue, the debenture stock must be treated as invalid.

Then, the only other point which is raised is this—whether all the other holders of the debenture stock, assuming them all to be valid, rank pari passu, or whether some of them are not entitled to priority over the others.

Those are the four points which we have to decide. I may say at once, having considered the judgment of Stirling J., I not only concur in the conclusion at which he has arrived, but I concur in the reasons which he has given upon all points except one, namely, as to the alleged over-issue of the 10,000*l.* I do not quite follow his reasoning as to the discount, as it is called, and I shall base my judgment upon reasons somewhat different from those given by Stirling J.

Now, I will take the first point at once. Assuming all these debenture stocks to have been validly issued, it is said that they all rank pari passu, and the way it is put is this, that no debenture stock at all was in fact issued, either under the Act of 1866 or the Act of 1871, or under the Act of 1882 or the subsequent Acts, until all the money which the company could raise had become raisable under those Acts of Parliament. In other words, that the facts are that there was not first of all, as alleged, a certain amount of debenture stock issued under the Act of 1866 which was in the market, and held by certain persons who had rights under the Act of 1866, and then a separate and distinct issue and subsequent issue under the Act of 1871, and then a third and distinct issue under the Act of 1882. That was not the course taken by the company, but they waited till after the Act of 1882 had passed before they issued anything, and then they issued a prospectus in which they proposed to raise debenture stock under all their Acts of Parliament. It is alleged under those circumstances whatever might have been the case if they had adopted a different course, that all the debenture stocks must

rank pari passu. Now, there is great difficulty in giving effect to that argument. In the first place, when they did raise the 116,600*l.*, they had not taken the precautions necessary to entitle them to raise money or to borrow at all except under the Act of 1866; they had not complied with the provisions relating to the justices and so on. The only power they had was under that Act. In addition to that it appears to me there is very great difficulty in following Mr. Buckley's and Mr. Theobald's argument upon the construction of the Acts themselves.

First of all, it is necessary to refer to the Companies Clauses Act, 1863, s. 24. Under the Companies Clauses Act, 1863, which was passed to amend the Companies Clauses Act of 1845, power is given to issue debenture stock. The Companies Clauses Act, 1845, did not contain any such power. There was power to borrow money under the special Act, and in exercising those borrowing powers the only mode of borrowing in the absence of special authority was by mortgage or bond; but in 1863 that power was enlarged. Part III. is headed "Debenture Stock," and this is debenture stock. Sect. 22 is this: [His Lordship read the section, and continued:—]

Now, what does that mean? It appears to me that it must mean, on ordinary principles of law, that you are to apply these provisions in the Companies Clauses Act of 1863 to any special Act which authorizes the company to borrow on debenture stock. Well, then, we apply this to each special Act authorizing the borrowing, and then we read, in s. 24, as to the holders of debenture stock, that is, debenture stock raised under the particular Act which must be construed as incorporating the provision that the holders shall not as amongst themselves be entitled to any preference or priority. If it were otherwise, there would be a most frightful misapprehension on the part of lenders on debenture stock, who advance their money upon the faith of the special Act of the company, on the understanding that they should not as amongst themselves be entitled to any preference or priority. It would be open to this, that without any special grounds, without drawing the attention of Parliament to it, the company might swamp them by getting another special Act with authority to issue another 500,000*l.* debenture stock, which would

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rank pari passu with the former stock. That interpretation cannot be sound nor has it been put upon these borrowing powers from 1863 down to the present time.

So far, I think, the case scarcely open to any serious difficulty. But if there is a doubt about it, it is entirely removed by the 44th and 46th sections of this company's special Act of 1882. [His Lordship read the sections, and continued:—] Now, it appears to me that these sections throw a most serious objection in the way of Mr. Buckley's contention. Here is a priority recognised and inferred, although perhaps it is going too far to say it is created, but it is obviously assumed.

I pass on to the second point, namely, that under the special Act of 1871, which authorized the company to borrow money, there was no authority to raise it by debenture stock; but the short answer to that is, that the Railway Companies Act, 1867, s. 24, authorizes the creation of debenture stock. That section is the one which Stirling J. relied upon, and though it is, I agree, not very clearly worded, I think it is impossible to deny that it has the effect of authorizing the issue of debenture stock. It is not in the Companies Clauses Act, and does not apply therefore to all companies incorporated by special Act of Parliament to which the Companies Clauses Act is applicable. This is one of the group of Acts known as the Railway Companies Acts. The Railway Companies Act of 1867 applies to railway companies with which we are dealing here, and not to waterworks or gasworks or other companies to which the Act of 1845 is applicable. Now, taking that Act of 1867, all we are concerned with is s. 24 of the Act. It runs thus: [His Lordship read the section.] I do not think there can be any reasonable interpretation of these words but this—that where a company has power to borrow money on mortgage or bond, it shall have under this section power to borrow by the issue of debenture stock. The section is awkwardly drawn, but I do not think it can have any other interpretation than this.

[His Lordship then considered the evidence relating to the other two objections, namely, that 50,000*l.*, part of the 116,600*l.*, was over-issued, and that the certificate of the justice required by the special Act of 1871 was not procured before 10,000*l.*, part

of the 100,000*l.*, was issued, and said that the result of the evidence was that there was no over-issue of the debenture stock under the Act of 1866; and that, although some money had been advanced before the certificate of the justice had been given under the Act of 1871, no debentures had actually been issued before that preliminary condition had been performed.] The appeal must therefore be dismissed with costs.

Lopes L.J. The first question arising in this case is with regard to the priority of the holders of this debenture stock. The debenture stock in question was raised under three Acts of 1866, 1871, and 1882. It was not raised at the dates of those Acts of Parliament, but it is said there was an aggregate exercise under all the Acts. The question is this: Did the holders of all these debenture stocks raised under those different Acts of Parliament rank pari passu?

Now, it appears to me that there are two answers, and two answers only, to that contention. The first answer is this, that we must look to s. 24 of the Companies Clauses Act, 1863, which at the end says that the holders of debenture stock shall not, as among themselves, be entitled to any preference or priority. That section is to be read into each of the special Acts, and when it is said it must be read into each of the special Acts, that means it must be read as if it was written out at length in those special Acts. Now, if this section were written out at length in those special Acts, would it not be obvious that it would apply only to the debenture stock raised under the particular Act with which that section was incorporated?

The other answer is this, that s. 46 of the special Act of 1882 applies, and without going through again what has already been said by my brother Lindley L.J., a similar section, or, I may say, identical almost in the same words, was dealt with by the late Master of the Rolls in the case of *Harrison* v. *Cornwall Minerals Ry. Co.* (1) He says this (2): "It appears to me that the moment you see they are to rank pari passu with the interest of all mortgages granted after the passing of the Act, it shews that they are not to rank pari passu with the interest of all

(1) 18 Ch. D. 334. (2) 18 Ch. D. 341.

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mortgages granted before." It seems to me that those two answers entirely dispose of the contention with regard to priorities.

I agree with the decision of the learned judge in the Court below, that there is priority according to the date of the issue, or perhaps, to put it more correctly, according to the dates of the respective Acts of Parliament.

Then the next point is as to the power to raise the 100,000*l.* Upon that I say no more than this, that it appears to me perfectly clear that under the Railway Companies Act, 1867, s. 24, there is power to raise that sum.

[His Lordship then considered the two other objections, as to the over-issue of 50,000*l.* and as to the validity of the issue of 10,000*l.*, part of the 100,000*l.* debenture stock, and expressed his concurrence in the opinion of Lindley L.J.]

Kay L.J. I will deal first with the contention as to the priority of the different issues and the nature of the debenture stock. None of the debenture stock was issued until after the passing of the three Acts which the company rely upon as enabling them to issue debenture stock. One was the Act of 1866, the second was passed in 1871, and the third in 1882. Now, we have heard these Acts canvassed very carefully. There is not in any one of them a statement that the debenture stock issued under the later Acts shall rank pari passu with the debenture stock under the earlier Acts. I cannot help thinking that it would be a very strong thing indeed to hold that a person who had lent money under one of these Acts of Parliament—say the Act of 1866—and had obtained debenture stock for it, could have the value of that debenture stock, if not utterly destroyed, at all events very much reduced, by the issue of debenture stock under a later Act which did not say that the two issues were to rank pari passu. So far from saying anything of the kind, the last of these three Acts, the Act of 1882, when we look at it, seems to me to say exactly the contrary. Sect. 46 of the Act, which has been referred to by both the Lords Justices, says in so many words that the interest on the debenture stock issued under that Act, the Act of 1882, and any subsequent Act, shall rank pari passu. But it says nothing of that kind as to the

debenture stock issued under the Act of 1866 or under the Act of 1871. Therefore, I do not find anything in this series of statutes which authorizes the Court to say that the debenture stock issued under one of these Acts of Parliament is to be diminished in value by the issue of debenture stock under a later Act of Parliament. On the contrary, it seems to me, upon the face of these Acts of Parliament, impossible to find any indication which is not exactly the other way, and that the legislature did not intend to alter the position of the debenture stock issued under the former Acts.

Well, then it is said that the general Act of 1863 has an important bearing on that. But if we turn to the Act of 1863, we find that, although it does refer to debenture stock ranking pari passu, it only in terms refers to that as a thing which is to happen where Part III. of that Act is incorporated in the special Act. So that what we have got is this: A special Act authorizing debenture stock to be issued and incorporating Part III. of the Act of 1863, and that Act, read at length in the Act which incorporates it, provides that the debenture stock shall rank pari passu. It is impossible to construe that in any other way than this, that the debenture stock created under that special Act shall rank pari passu. It is impossible to suppose that this Act of 1863, which was incorporated in the company's special Act of 1866, should intend to make any issue of debenture stock under subsequent Acts rank pari passu. I do not think the general Act makes any difference in that respect.

Then it is said that under the special Act of 1871 there was no power to issue debenture stock at all. I do not think it is possible to hold that when you look at the 24th section of the Railway Companies Act of 1867, which provides that any company may create and issue debenture stock subject to the provisions of Part III. of the Companies Clauses Act, 1863, relating to it. Therefore, after the passing of this Act, which was passed later than the first Act of this particular railway company, which was in 1866, it was not necessary to put in the Act of 1871 an incorporation of Part III. of the Companies Clauses Act of 1863. There was then a general Act enabling the railway company to issue debenture stock, and I suppose that is the reason why in

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the Act of 1871 there is no reference to it one way or the other. Therefore it seems to me that under the Act of 1871, coupled with the general Act of 1867 which I have referred to, there is power to issue debenture stock for the sum authorized by that Act.

[His Lordship then referred to the other two objections, and said that he concurred with the other Lords Justices in their conclusions respecting them, and agreed that the appeal must be dismissed with costs.]

Solicitors: *Linklater & Co.; Le Brasseur & Oakley; McDiarmid & Teather; Deacon, Gibson & Medcalf.*

M. W.

C. A. 1895 *May* 15, 17, 20.

PORTSEA ISLAND BUILDING SOCIETY *v.* BARCLAY.

[1892 P. 2059.]

Building Society—Ultra Vires—Power to lend on First Mortgage—Loan by Third Party to Society's Mortgagor—Partial Postponement of Society's Security—Part Payment of Society's Mortgage Debt—Subrogation—Equitable Relief—Imposition of Terms by the Court.

A building society was prohibited by its rules from lending on property subject to any previous mortgage, but had power to release any portion of a mortgaged estate if satisfied that the remainder would be a sufficient security. The society had lent H. 17,000*l.* upon first mortgage, and, having exhausted its borrowing powers and being in want of cash, it entered into an arrangement under which H. borrowed 6000*l.* from an insurance company upon the security of the property he had mortgaged to the society, and the society joined in the security and released the property so as to give the company a first charge for 6000*l.* The 6000*l.* was paid to H. and handed over by him to the society, who credited him with the amount in part discharge of the 17,000*l.*:—

Held, by the Court of Appeal (affirming the decision of Romer J.), (1.) that the transaction was ultra vires the society, and that its directors had no power to give the company any charge in priority to that of the society; (2.) that the company had no equity to claim equality for their mortgage with that of the society; and (3.) that the case was not one in which the Court ought to impose any terms upon the society.

The doctrine of *In re Cork and Youghal Ry. Co.* (L. R. 4 Ch. 748) explained.

APPEAL from a decision of Romer J. (1)

The facts of the case are fully given in the report of the

(1) [1894] 3 Ch. 86.

hearing before Romer J., and the following short statement of them will suffice for the purposes of the present report.

One of the rules of the building society (rule 11) provided (inter alia) as follows: "In no case shall any property be deemed a sufficient security for monies to be advanced by this society which shall be subject to previous mortgage otherwise than to this society. The directors may from time to time accept any other security by mortgage . . . in place of any existing security, or may direct the release of any portion of any mortgaged estate if they shall be satisfied that the remainder will be a sufficient security."

Before December, 1891, the society had advanced to one House, upon mortgage of his property, upwards of 17,000*l.*, which was still owing; they had exhausted their borrowing powers and were in want of cash. Under these circumstances they entered into an arrangement that House should borrow 6000*l.* from the Imperial Life Insurance Company on the security of the property he had mortgaged to the society; and that the society should join in the security and release its charge in favour of the trustees of the Imperial Company so as to give that company a first charge; and should further secure the company by a deposit of the deeds and securities held by House.

This arrangement was carried out by an indenture dated December 1, 1891, to which House, the society and its trustees, and the defendants Barclay and others, who were the trustees of the Imperial Company, were parties, and by a memorandum of deposit. On the completion of the transaction the trustees of the company gave House a cheque for 6000*l.*, which he handed to the society; and the society (which was now in liquidation) credited him therewith in their books in reduction of the amount owing to them on his mortgage. It was admitted that the memorandum of deposit was invalid; and it was held by Romer J. that the transaction was ultra vires; that the deed of December 1, 1891, by which the society purported to postpone its security in favour of the Imperial Company, was not binding; and that the company were in the position of second mortgagees.

The trustees of the Imperial Company appealed.

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Cozens-Hardy, Q.C., and *Rowden*, for the appellants. We contend, first, that we are entitled to rank as first mortgagees; and if not, then that we ought to be treated as assignees of 6000*l.*, part of the mortgage debt, and as such entitled to rank pari passu with the society. The transaction was not a device to turn a first mortgage into a second mortgage, but a reasonable arrangement by which the society realized 6000*l.* out of the debt, for which it held an insufficient security. The postponing the remainder was a reasonable arrangement into which an ordinary mortgagee might prudently enter for the purpose of getting this benefit, and there is nothing in the rules of the society to prohibit it. Rule 11 is only directory. The lending on a second mortgage would be an improper act, for which the officers of the society would be liable if a loss occurred; but the security would not be void. This is illustrated by *In re Coltman.* (1) If the transaction had been a device for converting a first mortgage into a second, there would still be ground to contend that, though it was an improper act for which the officers were liable, it was not beyond their powers, but it was in fact a way of realizing part of the money due on an insufficient security, and came within the discretionary powers which the officers of a society of this kind must always have. *Small* v. *Smith* (2) does not govern the case, for here there was "a potential necessity of entering into a transaction of this kind" for the purpose of carrying on the business. If, however, we are not entitled to rank as first mortgagees, we ought to rank pari passu with the society as to 6000*l.*

[KAY L.J. There was no bargain for a transfer. How can you rank as transferees?]

The Courts have been astute to keep alive against an estate the rights of a person who pays off an incumbrance upon it. Here the Portsea Island Building Society unquestionably received 6000*l.* of their debt out of our moneys, and the equity arises which was allowed in *In re Cork and Youghal Ry. Co.* (3), and which was expounded by Lord Selborne in *Blackburn Building Society* v. *Cunliffe, Brooks & Co.* (4) The society are seeking to put them-

(1) 19 Ch. D. 64.
(2) 10 App. Cas. 119.
(3) L. R. 4 Ch. 748.
(4) 22 Ch. D. 61, 71.

selves by means of our money in a better position than they were before.

They do not come with clean hands, and there is nothing to constrain the Court to aid them. At any rate, the Court ought not to leave the company in the position of second mortgagee, but ought, before giving any relief to the plaintiffs by way of declaration or otherwise, to impose some terms upon them so as to put the company upon an equal footing with them. This might be done by treating the transaction as one of contributory mortgage; for though there is no express power in that behalf, there is nothing in the rules of the society to forbid lending upon such a mortgage, and the directors of societies like this are not bound by the hard and fast rules which govern ordinary trustees: *Sheffield and South Yorkshire Building Society* v. *Aizlewood* (1); *In re Faure Electric Accumulator Co.* (2)

[They also employed the arguments and cited the authorities mentioned in the report of the case before Romer J., and in addition referred to the case of *Pease* v. *Jackson* (3) upon the effect of a receipt indorsed upon a mortgage or further charge.

Counsel for the respondents, the society, and its liquidators, were only called upon on the question whether the Court ought to put them on terms.]

Haldane, Q.C., *Carson, Q.C.*, and *Edward Ford*, for the respondents. We are not coming to this Court to ask for equitable relief, but in order to assert a legal right. It was not the Portsea Island Building Society, but it was the directors who were acting ultra vires. We are asking the Court to declare that the act of the directors in affixing the seal of the society to this document was not a legal act, and there is no case in the books in which the Court has, under similar circumstances, imposed conditions upon a plaintiff. But supposing that the Court had the power to mould its relief, the course suggested would also be ultra vires the society, for the rules are inconsistent with, and impliedly, if not expressly, prohibit any lending on contributory mortgage; and the admission of a co-mortgagee to equal rights

(1) 44 Ch. D. 412, 453, 454. (2) 40 Ch. D. 141, 150.
(3) L. R. 3 Ch. 576.

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is just as objectionable in the case of directors of societies like these as in the case of ordinary trustees.

Cozens-Hardy, Q.C., in reply.

LINDLEY L.J. This case is an important one, and in some respects the decision at which we have arrived will be a hard one for the appellants.

There is no controversy that in December, 1891, the Portsea Island Building Society had far exceeded its borrowing powers, and that fact was unquestionably known to the appellants. The society wanted cash, and one method of getting it was to induce House and others in his position to pay off their mortgages; so an arrangement was come to that the company should at the request of the society lend House 6000*l.*, and that in consideration of that advance the company should have a first charge on the property mortgaged by House to the society, or in other words, that the society should postpone its charge to the claim of the company. This arrangement was carried out by the deed of December 1, 1891; and it is obvious from the recitals and frame of that deed, and from the circumstances which were known to the parties at the time of its execution, that the very last thing in contemplation was that the company should lend money to the society. That they knew they could not do, because they knew that the society had long before exhausted all its borrowing powers.

They knew, therefore, that the transaction must take the form of a loan to House, and that nothing short of that would have a reasonable chance of being a valid transaction. [His Lordship then stated the recitals and operative part of the deed of December 1, 1891, and continued:—]

Now, the effect of that was very simple and very plain; and the legal effect was exactly what the parties intended.

It was a loan by the company to House upon the terms that they were to have a first mortgage upon the property, which up to that time had been in first mortgage to the society, and the society's mortgage was to be postponed to the extent of 6000*l.* until the company's security had been paid off. That is the real effect of the transaction; and I think it is rightly said that such

a transaction was beyond the powers of the directors of the society. The question turns upon the rules of the society, and it is impossible to read rule 11 without seeing that it was impliedly forbidden. To lend money on second mortgage is expressly forbidden; so this was not in form a loan on second mortgage. But the transaction, though not in form a second mortgage, had all the incidents, all the consequences, and all the inconveniences of a second mortgage.

I think, as I have already said, that it is impossible to read rule 11, and to see what the effect of this transaction is, without coming to the conclusion that it was beyond the powers of the directors. Speaking for myself, I do not think that it comes exactly and directly within rule 11, because they were not "advancing moneys" to House, but they were doing something which put them in the position of second mortgagees, which the rules say they are not to occupy. There is all the difference in the world between taking a first mortgage and taking a second mortgage, even if the second mortgage is a good security. Quite apart from the value of the security, a second mortgagee is always liable to be excessively embarrassed by the action taken by the first mortgagee, even if the security is a good one. There is redemption, and there is sale, and there are the costs, and all sorts of things which embarrass a second mortgagee. One knows perfectly well that prudent people are very slow to lend money on second mortgage. There is good sense in saying to a building society, "You shall have nothing to do with second mortgages"; and it appears to me that it is impossible to read these rules without seeing that second mortgages are directly prohibited when they take the shape of an advance on second mortgage, and impliedly so when they take any other shape. And what the directors were doing here was in the teeth of the rules, as I read them.

I cannot, therefore, differ from the decision of Romer J., that this transaction was ultra vires as regards the society, and that its directors had no power whatever to enter into a bargain that the company should have a charge upon this property in priority to the society. That is the main point of the case.

Then it is said, but although that is so, the appellants have an

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equity either to stand in the position of the society as regards 6000*l.*, or, at all events, to stand in the position of creditors who have been paid off by means of their money. Let us consider the first point, which is to my mind the most difficult. It stands in this way: The society say, "Although the company at our request advanced House 6000*l.* upon the terms that they were to have a security on our property, as we cannot comply with those terms, our mortgage takes effect in priority to theirs." That does not seem just; and if there were any way out of it, I certainly would assist the appellants, and I think I may say Romer J. would have done so. But there is a great difficulty in doing it. In the first place, I doubt very much whether this is asking for equitable relief as distinguished from legal relief. But apart from that, I do not see how it is possible to put the appellants in the position which they are now suggesting unless we could come to the conclusion that an arrangement to that effect would have been within the powers of the directors. If we could come to the conclusion that the company might have occupied the position of a contributory mortgagee it might possibly be done. But there, again, looking at rules 11 and 13, I do not think that such an arrangement would have been a proper one for the directors of the society to make, and I think it would be involving or sanctioning a breach of trust if we were to take that view. I do not think it could be done. Certainly there is no case which goes anything like the length to which we should be going if we were to make a declaration to that effect.

Now, as to the other point invoking in aid the doctrine of the *Cork and Youghal Railway Case* (1), and that class of case. That appears to be wholly out of the question. The legal answer to that is this. The Imperial Company never lent money to the Portsea Society at all; they not only did not do so, but they intended not to do so. They lent their money to House, and what House has done with his money has nothing to do with the matter. If the money they lent to House has gone to pay creditors or anybody else, that may be House's affair; but it is not their affair. The principle on which the doctrine of the *Cork and Youghal Railway Case* (1) rests is, in my opinion, extremely

(1) L. R. 4 Ch. 748.

well stated by Lord Selborne in the *Blackburn Building Society* v. *Cunliffe, Brooks & Co.* (1), and it is impossible to read that statement without seeing that the doctrine presupposes a loan to the society—a loan which may be ultra vires, but is a loan direct from the company to the society, and which has been applied in paying off obligations of the society.

This was nothing of the sort. A direct loan to the society was purposely avoided, and we should be extending that doctrine to a case to which the reasoning does not at all apply. For the reasons I have given I do not think the appellants are entitled to the relief asked, and I come therefore to the conclusion, though reluctantly, that the decision is right, and that the appeal must be dismissed.

LOPES L.J. I am of the same opinion. It seems to me clear that this transaction was ultra vires. In point of fact, the transaction appears to me to be an indirect mode by which the society seeks to enlarge its borrowing powers. The true nature of the transaction is this: it is a transaction by which the directors have accepted for the balance of the debt due from House an insufficient and improper security—insufficient and improper under the rules, namely, a second charge. I cannot help thinking that Romer J. put it very well when he said that the transaction was really just as if House had obtained from the assurance company the whole of the 17,000*l.*, had then paid off to the society the mortgage debt, and then the society had re-lent 6000*l.* of the money on the first mortgage, and the other 11,000*l.* on a secondary contributory mortgage. Clearly that is a transaction which could not have been maintained under the rules, and speaking for myself—on all these subjects I speak with diffidence—it appears to me that the transaction is practically the same as that.

Then there was another point taken: the insurance company say that they have an equity to stand in the shoes of the building society as regards the 6000*l.*

I entirely agree with what Lindley L.J. has said on this point, and I would only add that that was not the contract. The

(1) 22 Ch. D. 71.

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contract was that it was to be a first charge. It was not this: that if it was not a first charge they were to come in pari passu—that was not the contract at all between these people. The contract was an express one that the Imperial were to have a first charge. With regard to the last point, I think the answer to that is that it was in truth and in fact a loan to House. The only person whom the insurance company could have sued would have been House, because the loan was to him. I entirely agree with Romer J., and I think the result he has arrived at is the correct one.

KAY L.J. In all these cases of building societies, it is extremely important to see that the acts which they have done are entirely within their powers; and if in this case we were brought to the conclusion that this transaction could be supported in the form which it has taken, of course it would be a precedent on many future occasions, and to my mind it would be a very dangerous precedent indeed.

The main circumstances of the case are these: When the transaction was entered into, the Portsea Island Building Society had exhausted all its borrowing powers, and could not borrow money from any one. It seems to have wanted cash, and the contrivance by which it sought to obtain cash was one which, as I understand, was followed in other cases besides that of House. House was a person to whom the society had made an advance, taking, in accordance with its rules, a mortgage of property to secure it. [His Lordship then stated shortly the facts of the case, and continued:—]

Now, the first question is whether a transaction of that kind is within the powers of this society? I quite agree with what has fallen from the Lords Justices who have preceded me—that, reading the rules carefully, no other conclusion can fairly be come to than this, that this transaction, by which the building society converted their mortgage into a second mortgage, was one which was entirely beyond the powers of the directors of that society. I agree that rule 11 does not in express terms refer to a transaction of this kind, because it only prohibits second mortgages *upon an advance being made;* and in this case when

this transaction was carried out no advance was made by the building society to House. But you cannot possibly read the rule without seeing that the object and purpose of it was to prevent the society ever under any circumstances being placed in the position of second mortgagee. I therefore come to the conclusion that this transaction was not within the powers of the building society or its directors.

Then the next question, and the only one which seems to me to offer any difficulty, is whether, upon making a declaration to that effect and granting the consequential relief asked in this case, the Court can impose terms upon the society so as to put the company into at least as good a position as the society, and to make their mortgages rank pari passu with one another.

In the first place, as Lopes L.J. has said, that was not the contract. The contract was most plainly one by which the Imperial Company were to have a first mortgage; and therefore, if this Court holds that contract to be invalid, it would be a strong thing to say, that it should by some proceeding or other give the company what they never bargained for, namely, a mortgage which is to rank pari passu with the mortgage of the society. But it seems to me that the best answer of all is this, that such a transaction also would be beyond the powers of the society, or at least would be an extremely improper transaction — I need not put it higher than that — for the directors of the building society to enter into. I do not think that these rules at all contemplated that the society should take part of what is commonly known as a contributory mortgage. I think it is contrary to the meaning of these rules that they should become mortgagees pari passu with somebody else who lends money to the mortgagor. That would be quite a sufficient reason for holding that, even if the Court had power to impose terms of this kind, they would not be proper terms to impose, because any mortgage of that kind would, to say the least of it, be a very improper security for the directors to take. But also, I doubt extremely whether this is a case in which any terms can be imposed. What the society are really asking is to have a declaration that the attempted postponement of their mortgage to the mortgage of the Imperial

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Life Insurance Company was a thing beyond their powers. If the Court made that declaration, and stopped there, it would be a declaration simply of the rights of the parties in a transaction of this kind, to which I apprehend no kind of condition could be added, and on making which no terms of any kind could be imposed.

I understand the rule to be this, that where parties are coming for simply equitable relief the Court of Equity may say, "We have a discretion whether we will grant or refuse that relief, and, therefore, we can grant it upon such terms as we think right to impose, because you are asking equity, and therefore we impose certain terms upon you." I will not put my opinion stronger than a doubt whether this is a case in which that doctrine could be applied and any terms could be imposed.

There remains only the third contention, which is, that the doctrine asserted in the *Cork and Youghal Railway Case* (1) and the numerous cases which followed it is applicable to this case. As I understand it, that doctrine is, that where a person advances money to a society whose borrowing powers are exhausted, although he cannot recover the money from the society directly, yet in cases where the society has not increased its liability by the borrowing, but has applied the money in paying other debts, he may assert a right to stand in the position of a creditor who has been paid off with his money. But here the simple answer is, there never was any loan by the insurance company to the building society. That is what they have most carefully avoided. They knew perfectly well that the borrowing powers of the society were exhausted, and the very last thing the company would have thought of doing would have been to put the transaction in the form of a loan to the society. They carefully avoided doing anything of the kind; and therefore that doctrine does not apply to this case.

I think, upon the whole, although no doubt in one view it is a very hard case, the decision of Romer J. was perfectly right on all points, and this appeal must be dismissed with costs.

Solicitors: *Henry Kimber & Co.; Learoyd, James & Mellor.*

(1) L. R. 4 Ch. 748.

W. W. K.

In re WOODIN.
WOODIN *v.* GLASS.

C. A. 1895 May 23, 24.

[1894 W. 1734.]

Infant—Maintenance—Contingent Gift of Leaseholds—Intermediate Income—Separation from General Estate of Testator—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 43.

A testator gave certain leasehold property to trustees upon trust to pay the income to his daughter during her life, and after her death upon trust to transfer the same to all her children in equal shares, the shares of sons to be vested in them at twenty-one, and of daughters at twenty-one or marriage. The testator made other specific bequests, and gave his residuary estate upon certain trusts for his children. The daughter died, leaving several children, all of whom were infants:—

Held, that the effect of the bequest being to separate the leaseholds from the general estate of the testator, the intermediate income until one of the children attained a vested interest was applicable to the maintenance of the infant children.

Kidman v. *Kidman* (40 L. J. (Ch.) 359) followed.

Furneaux v. *Rucker* (W. N. (1879) 135) disapproved. Observations on the practice of relying on decisions briefly reported in the *Weekly Notes*.

Joseph Steward Woodin, by his will dated October 12, 1866, gave certain leasehold messuages, ground-rents, and hereditaments in Middlesex to two trustees, for the residue of the respective terms therein, upon trust to pay the net rents and produce thereof to his daughter Emily during her life for her separate use, and after her decease upon trust to transfer the said leasehold premises unto such one or more of the children of his said daughter in such shares and in such manner as his said daughter should by deed or will appoint, and in default of such appointment unto and amongst all the children of such daughter in equal shares, the shares of sons to be vested in them at twenty-one, and of daughters at that age or marriage. And he bequeathed certain other leasehold messuages, ground-rents, and hereditaments to the same trustees upon trust to pay the net rents and produce thereof to his daughter Sophia during her life for her separate use in precisely the same manner and with similar limitations over to her children as were before expressed respecting the messuages

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given in trust for his said daughter Emily. Provided always that, if either of his said daughters should die without leaving any child or children who should live to acquire a vested interest in such messuages and premises, then he directed that the several messuages and premises thereby bequeathed in trust for her and her children should be held in trust for his surviving daughter and her children in the same manner and with the same restrictions and limitations over as if the same had originally formed part of the messuages and premises thereinbefore bequeathed to his said surviving daughter. And the testator declared that if at his decease any of his sons or daughters should be under the age of twenty-one years, his trustees should apply out of the rents, issues and profits to which they should be respectively or presumptively entitled, such profits or other sum towards their maintenance, education, or advancement as the trustees should think fit, and should accumulate the surplus of the rents, issues and profits as therein mentioned. And after devising his freehold and copyhold estates to his three sons in strict settlement, the testator gave his residuary estate to the same trustees upon trust to convert the same into money and to divide the proceeds equally among his children living at his death, except his eldest son, to vest in sons at twenty-one and daughters at twenty-one or marriage.

The testator died in January, 1870. His daughter Emily married H. A. Glass, and died on October 23, 1889, leaving three children—Evelyn C. Glass, Hamilton A. Glass, and Joseph S. Glass, all of whom were still infants.

The testator's daughter Sophia married R. G. Marsden. She died on August 27, 1877, leaving one child only—R. S. Marsden, who was also an infant.

Emily Glass left a will, dated in October, 1882, by which she appointed that the leasehold premises bequeathed to her and her children should go unto and equally between her children who being sons should attain the age of twenty-one years or being daughters should attain that age or marry.

Sophia Marsden did not make any appointment under her power.

The trustees paid the rents and profits of the leasehold

premises to Mrs. Glass and Mrs. Marsden during their respective lives, and accumulated them after their deaths.

By an order made by Malins V.-C. on January 12, 1881, in the matter of R. S. Marsden, an infant, it was ordered that a sum of 100*l.* per annum should be paid by the trustees for his education and maintenance till further order, and that sum had since been paid each year out of the rents of the leasehold property bequeathed to Sophia Marsden. This order was made in the presence of two of the residuary legatees, but no discussion appears to have taken place as to the rights of the parties. The trustees, being doubtful to whom the income of the leasehold property belonged in the interval between the deaths of Emily Glass and Sophia Marsden respectively and the vesting of the shares in the children, took out an originating summons, to which the infants J. S. Glass and R. S. Marsden and the residuary legatees were made parties, to take the opinion of the Court whether the plaintiffs were at liberty to apply the income received from the leasehold hereditaments and the accumulations of the rents respectively for the maintenance and education of the respective infants, or how such income and accumulations should be dealt with and disposed of, and who were entitled to the same respectively.

The summons was heard before North J. on February 18, 1895, when his Lordship considered that the case was bound by the decision in *Furneaux* v. *Rucker* (1), and declared that the rents and profits of the leasehold premises devised in trust for Emily Glass and her children, from her death until one of her children attained twenty-one, or being a daughter married under that age, were not applicable to the maintenance of the infant J. S. Glass or the other infant children of Emily Glass, but, including the accumulations, fell into the testator's residuary estate. He made no order respecting the allowance paid for the maintenance of R. S. Marsden, but declared that any party interested was to be at liberty to apply in respect of the accumulation of the rents and profits of the leasehold premises devised in trust for Sophia Marsden and her children, on the defendant R. S. Marsden attaining twenty-one or dying under that age.

(1) W. N. (1879) 135.

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The infant J. S. Glass appealed from this decision, and there was also a cross-motion of appeal by the residuary legatees respecting the income of the share of the infant R. S. Marsden.

Buckley, Q.C., and *Chester*, for J. S. Glass. The testamentary appointment by Mrs. Glass has made no difference in the interests of the infants. They are contingently entitled to shares in the leasehold property, and the intermediate income will belong to those who attain a vested interest in the shares from which the income is derived. They are, therefore, entitled to maintenance out of the income of their presumptive shares. It has been well-established that, where a contingent legacy is separated and set apart from the general estate of a testator, the income does not fall into the residue, but goes with the legacy. There is a distinction in this respect between real and personal property, and it makes no difference that the property is an interest in land: *In re Dickson* (1); *In re Medlock* (2); *Kidman* v. *Kidman* (3); *In re Holford* (4); *In re Adams* (5); *In re Burton's Will* (6); *In re Clements* (7); *Long* v. *Ovenden* (8); Theobald on Wills, 4th ed. p. 153. In the present case the property is set apart in the hands of trustees, and separated from the rest of the estate.

Swinfen Eady, Q.C., and *Method*, for the infant R. S. Marsden.

Vernon Smith, Q.C., and *Rowden*, for the trustees, one of whom was a residuary legatee. The authorities are not altogether consistent, but the general rule is well established that the intermediate income of a contingent special bequest of chattels real or other personalty does not follow the bequest, but belongs to the residuary legatee: *In re Dickson* (1); *Holmes* v. *Prescott* (9); *Wright* v. *Warren* (10); *Guthrie* v. *Walrond* (11); *Hodgson* v. *Earl of Bective*. (12) *Furneaux* v. *Rucker* (13) is directly in point, and was followed in *In re Jeffery*. (14)

(1) 29 Ch. D. 331.
(2) 55 L. J. (Ch.) 738.
(3) 40 L. J. (Ch.) 359.
(4) [1894] 3 Ch. 30.
(5) [1893] 1 Ch. 329.
(6) [1892] 2 Ch. 38.
(7) [1894] 1 Ch. 665.
(8) 16 Ch. D. 691.
(9) 33 L. J. (Ch.) 264.
(10) 4 De G. & Sm. 367.
(11) 22 Ch. D. 573.
(12) 1 H. & M. 376.
(13) W. N. (1879) 135.
(14) [1891] 1 Ch. 671.

Eustace Smith, for the other residuary legatees. The form of the gift in the will shews that the testator did not contemplate that the intermediate income could belong to the children of his daughter. He directs the trustees to transfer the leaseholds to those who acquire vested interests, but says nothing of the accumulations.

Buckley, Q.C., in reply.

Cur. adv. vult.

May 24. LINDLEY L.J. In this case we have considered the will and the authorities that were cited to us yesterday upon it, and the conclusion at which I have arrived is that the appellant's contention is well founded, and ought to prevail. The question turns upon whether some infants to whom certain leaseholds were left, in language which I will read presently, are entitled contingently to the income of those leaseholds, so that the Court can direct maintenance of those infants out of the income of that property.

The will in question is the will of Joseph Steward Woodin, and he had several children for whom he provided by his will. His daughters Emily and Sophia were provided for in this way. [His Lordship read the bequests stated above.]

It appears that the daughter Emily died in October, 1889. She had three children, and by her will, which was dated in October, 1882, she appointed to such of her children as should attain the age of twenty-one or marry. So that the gift to the children, whether you look at the will in default of appointment, or whether you look at the appointment itself, is contingent. Nothing is said here about the income of these leaseholds after the death of the tenant for life—that is to say, after Emily's death and Sophia's death; nor is there in the will any clause which in terms relates to the maintenance of the grandchildren. There is a clause in the will which refers to the maintenance of the testator's children—but not of the children of these daughters.

Under those circumstances, the trustees have applied for directions as to whether they can properly apply the income of these leaseholds to the maintenance of these children who are under

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age. It appears that Malins V.-C., by an order made in 1881, did direct the maintenance of the child of Sophia Marsden, and there is a question upon that as well as upon Emily's gift.

North J. has come to the conclusion that there is no gift of the income of the leaseholds to these children when they attain twenty-one, or, being daughters, marry under that age; and he has, therefore, decided that there can be no maintenance. He has relied apparently upon the case of *Furneaux* v. *Rucker* (1), which is also to be found referred to a little more at length in the judgment of North J. in *In re Adams*. (2) Now, with reference to *Furneaux* v. *Rucker* (1), which we have had occasion to consider before, and which we have tried to make something of, all I can say is that I do not understand it; it is not reported in such a way as to be intelligible to me. Whether it was right or wrong I have not the least idea; but I take it for granted, as I should do of any other decision, that it is right unless the contrary is shewn. But if *Furneaux* v. *Rucker* (1) was decided upon principles contrary to those which are supported by the cases to which I will presently allude, then I think that *Furneaux* v. *Rucker* (1) was wrong; but whether it is so or not I do not know.

It appears to me that there is a principle which is applicable to this case, and which is contrary to the view taken by North J. Here we are dealing with leaseholds—that is, with personal property. We are not dealing with freeholds, copyholds, or any other real estate. Now, in dealing with personal property, whether leaseholds or not, there are three cases which are important. There is the case of *Kidman* v. *Kidman* (3), which was before Malins V.-C.; there is the case of *In re Medlock* (4), which was before Kay L.J., when sitting as a judge of the first instance; and there is the case of *In re Clements* (5), before Chitty J. Now, those three cases, and I dare say there are others, but I have not looked further, seem to me to lay down a principle which is perfectly intelligible, and which is applicable to this case. That principle is stated very accurately in the last edition of Mr. Theobald's book, at p. 153, and it runs thus: "Where

(1) W. N. (1879) 135.
(2) [1893] 1 Ch. 329.
(3) 40 L. J. (Ch.) 359.
(4) 55 L. J. (Ch.) 738.
(5) [1894] 1 Ch. 665.

a fund is directed to be invested and held by trustees upon certain trusts, or is otherwise directed to be set apart from the rest of the testator's estate, it carries the income." Then *Kidman* v. *Kidman* (1) is abridged very accurately: "A fund which has been severed for the benefit of a tenant for life and remainderman, carries the interest accruing between the death of the tenant for life and the vesting in the remainderman." Then *Long* v. *Ovenden* (2) is referred to as shewing that an appointed fund carries the intermediate interest. That appears to me to be an intelligible proposition. When we look at this will what, after all, we have to ascertain is the intention of the testator to be gathered from the words that are used. What has he done? He has taken these leaseholds, severed them from the rest of his estate, given them to trustees for the daughter, and then to her children as she shall appoint, in terms which will clearly authorize a payment of the income of those leaseholds to the children if she chose to exercise it in that way. In her appointment she has said nothing about income; but it does seem most extraordinary to say of a will constructed like this that it was not the intention of the testator that her children should have the intermediate income, but that the intermediate income must by some rule of law be treated as undisposed of and go into the residue until the children attain twenty-one. It appears to me that this case falls within the principle of those cases to which I have alluded, and which are based on good sense, and that if these cases are contrary to *Furneaux* v. *Rucker* (3) they must be preferred to it.

I do not think the cases referred to by Mr. Vernon Smith are opposed to this decision. *Holmes* v. *Prescott* (4) and *Hodgson* v. *Earl of Bective* (5), when you come to look at them, do not fall within the category of cases to which I have been referring; and it would be quite contrary to the intention of the testator, to be fairly gathered from the mode in which he has dealt with this particular fund, these leaseholds, to say that the children are not to have the income, and that the income cannot be applied to

(1) 40 L. J. (Ch.) 359.
(2) 16 Ch. D. 691.
(3) W. N. (1879) 135.
(4) 33 L. J. (Ch.) 264.
(5) 1 H. & M. 376; 10 H. L. C. 656.

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their maintenance so long as they are minors. Therefore I think the decision of North J. in this case must be reversed.

Lopes L.J. I entirely agree. We are dealing with leaseholds, and I know no ground on which in a case like this leaseholds stand in a different position from other personal property.

Then the question is, what principle are we to apply? I entirely agree that the proper principle to apply is the principle which is to be gathered from the three cases to which reference has been made, namely, *Kidman* v. *Kidman* (1), *In re Medlock* (2), and *In re Clements* (3), and, applying that principle, I come to the conclusion that the decision of the learned judge below was wrong, and ought to be reversed. And there is this satisfaction in adopting this principle and applying it to the present case, that I feel quite clear that by so doing we are carrying out the intention of the testator. The case of *Furneaux* v. *Rucker* (4) was cited, and it is said that the principle involved in that case is different from the principle involved in the three cases to which I have referred. All I can say is that I have great difficulty in understanding the decision in *Furneaux* v. *Rucker* (4), and if the principle contained in that case is not reconcilable with the principle contained in the cases to which I have referred, I do not agree with the decision.

Kay L.J. I have come to the same conclusion upon this particular will. There is no doubt that a contingent specific bequest of chattels real or of other personalty not being residuary personalty, where the subject-matter of the gift is not directed to be set apart from the rest of the estate, will not carry the intermediate income. This is stated as the result of the authorities by Mr. Theobald in the last edition of his book, at p. 146, and he cites *Holmes* v. *Prescott* (5), *Guthrie* v. *Walrond* (6), and *Wright* v. *Warren*. (7) Now, *Guthrie* v. *Walrond* (6) most certainly supports very distinctly that statement; and if we had got here nothing but a contingent bequest of chattels real which

(1) 40 L. J. (Ch.) 359.
(2) 55 L. J. (Ch.) 738.
(3) [1894] 1 Ch. 665.
(4) W. N. (1879) 135.
(5) 33 L. J. (Ch.) 264.
(6) 22 Ch. D. 573.
(7) 4 De G. & Sm. 367.

were not directed to be set apart from the rest of the estate, the intermediate income would not pass.

But it has been held for a very long time past in the cases which were collected in Theobald on Wills, at p. 153, and Lindley L.J. has referred to them, that where a fund is directed to be invested and held by trustees upon certain trusts or otherwise directed to be set apart, it does carry income.

The real question is, what is the construction of this will? By this will are these leaseholds—which were given specifically to trustees upon trust as to one set to one of his daughters, and after her death as she should appoint among her children, and in default of appointment to the children, vesting at twenty-one, or in case of daughters on marriage—or are they not, severed from the bulk of the testator's personal estate? If they are, the rule applies. If they are not, then any intermediate income, till the contingency arises, between the death of the tenant for life and the vesting in the children of that tenant for life would fall into the residue.

Now, what better indication could we possibly have of setting apart property so as not to form part of the bulk of the testator's estate than giving it specifically to trustees upon trust for one tenant for life, and then giving to that tenant for life power to deal with everything, principal and income, from the moment of her own death, and in default of her doing so giving the capital to her children who shall attain twenty-one? True, it is a contingent gift to these children, but if the whole thing has been separated from the bulk of the testator's personal estate, then there is no ground for saying that the intermediate income between the death of the tenant for life and the vesting in the children of the tenant for life remains part of the residue.

The case of *Kidman* v. *Kidman* (1) is valuable, because there the very same thing occurred, and it was held that a fund which had been severed for the benefit of a tenant for life and remainderman did carry the interest accruing between the death of the tenant for life and the vesting in the remainderman. Here you have got exactly that state of things. You have got the leaseholds severed from the rest of the estate, vested in

(1) 40 L. J. (Ch.) 359.

C. A. 1895 *In re* WOODIN. WOODIN *v.* GLASS. Kay L.J.

trustees for the benefit of the tenant for life, and after that tenant for life's death to go to the appointees, being children of the tenant for life, and in default, as I have mentioned, to the children who have attained twenty-one. I cannot see how this case can be distinguished from the case to which reference has been made, or from the principle which has been laid down for a long time as governing questions of this kind as to the disposition of the intermediate income.

Really the only case which strikes me as being contrary to this view is the case of *Furneaux* v. *Rucker* (1) which has been brought before us. Now I, speaking for myself, venture to protest against a case being treated as authority which is reported only very briefly in the *Weekly Notes*, where we cannot tell from the report what the argument was, and cannot tell what the reasons of the judge were, and where we do not even know distinctly what the provisions of the will were. All I can say is, that if it did decide something contrary to the rule laid down in some of the previous cases, it cannot be treated as a good authority for contradicting so well established a rule. I therefore hope that *Furneaux* v. *Rucker* (1) will not be cited again as an authority for anything, because I do not think anybody can really understand upon what principle that case was decided. I am of opinion that the decision of the learned judge in the Court below must be reversed.

LINDLEY L.J. The form of the order will be this: "Declare that the rents and profits of the testator's leasehold estate devised in trust for the testator's daughter Emily and her children, from the death of the said Emily until a child should attain twenty-one, or, being a daughter, marries, are, with the accumulations thereof, applicable to the maintenance of the infant defendant Joseph Glass, and the other infant children if any." And the same with regard to Mrs. Marsden's share.

Solicitors: *R. G. Marsden & Wilson; Torr, Gribble, Oddie & Sinclair.*

(1) W. N. (1879) 135.

M. W.

TAUNTON *v.* SHERIFF OF WARWICKSHIRE.

C. A. 1895 May 24.

[1895 T. 301.]

Company—Debenture—Floating Security—Execution Creditor—Intervention of Debenture-holders after Seizure in Execution — Sale — Priorities — Interpleader.

On February 9 a creditor recovered judgment against a limited company for 51*l.* 12*s.* and costs, and on the 14th levied execution. On the 16th, holders of debentures which gave a floating security on all the property of the company the plaintiffs, commenced an action to enforce their securities: on the 18th notice of this action was given to the execution creditor, and notice was given to the sheriff that the goods seized belonged to the plaintiffs. On the 21st the plaintiffs, being informed that the sheriff was about to sell, issued a writ in the present action, and obtained an ex parte injunction to prevent the sale. Notice of the injunction arrived too late to stop the sale, but it was stopped by the plaintiffs' solicitor handing to the sheriff's officer 70*l.* under protest, with a letter requiring the sheriff to issue an interpleader summons as to it, and stating that the payment was made without prejudice to any rights of the plaintiffs. On the 22nd a receiver was appointed in the debenture-holders' first action. Kekewich J. held that the 70*l.* belonged to the debenture-holders. The execution creditor appealed:—

Held, by the Court of Appeal, that the goods seized could not be treated as having been sold, and that the title of the debenture-holders to them must prevail over that of the execution creditor; that the 70*l.* was to be treated as deposited with the sheriff's officer to abide the result, and that the execution creditor had no title to it:

Held, further, that the proper course would have been for the sheriff to take out an interpleader summons when he received the notice of February 18.

Quære, as to the priorities in case of actual sale and payment of the proceeds to the execution creditor.

THIS was an appeal by the King's Norton Metal Company, execution creditors of the Birmingham Ammunition Company, from a decision of Kekewich J. (1)

The facts are sufficiently stated in the report of the case in the Court below. It is only necessary to add that notice of the institution of the action of *Taunton* v. *Birmingham Ammunition Co.* (2) was given by the plaintiffs' solicitors to the sheriff, and

(1) [1895] 1 Ch. 734. (2) 1895 T. 273.

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to the solicitors for the King's Norton Metal Company, on February 18.

Ryland, for the appellants. If this property is treated as having been sold, the point arises which was reserved by Lindley L.J. in *In re Opera, Limited.* (1) If the sheriff only seizes the goods, I admit that the debenture-holders must prevail; but I submit that is not so where there has been not only seizure but sale. In the ordinary case the proceeds of sale do not represent the goods, they are the money of the party for whom the sale is made: *Swain* v. *Morland* (2); the sale being complete, though the money has not been paid over. The sale was legal, for the sheriff had no notice of the injunction. A floating security can only be enforced once for all by stopping the business of the company by the appointment of a receiver: *In re Panama, New Zealand, and Australian Royal Mail Co.* (3); *In re Florence Land and Public Works Co.* (4) A floating security leaves a company in possession of its property for the purpose of carrying on its business, and doing all things necessary to enable them to carry on business to advantage: *In re Hamilton Windsor Ironworks* (5); *In re Colonial Trusts Corporation* (6); *Wheatley* v. *Silkstone and Haigh Moor Coal Co.* (7), and the judgment and the execution upon it are incidents to the ordinary course of carrying on the business. A business would be hampered if the company could not give its business creditors the ordinary rights of creditors against its assets. [*Edwards* v. *Standard Rolling Stock Syndicate* (8), and *McMahon* v. *North Kent Ironworks Co.* (9) were also referred to.] Execution creditors take, no doubt, subject to the equities of the debenture-holders, and the question is what their equity is. I ask the Court to say that their equity is limited to enforcing their securities by the appointment of a receiver, and that here the debenture-holders were too late.

But if the Court is of opinion that there was no sale, and I urge this on the Court as the preferable view, then I say that

(1) [1891] 3 Ch. 260.
(2) 3 Moore, 740, 752.
(3) L. R. 5 Ch. 318.
(4) 10 Ch. D. 530.
(5) 12 Ch. D. 707, 714.
(6) 15 Ch. D. 465.
(7) 29 Ch. D. 715, 724.
(8) [1893] 1 Ch. 574.
(9) [1891] 2 Ch. 148.

the money was paid to the sheriff for the benefit of the execution creditors. A debenture includes nothing but property of the company, and this money never was property of the company. It is just as if an outsider had come and paid out the sheriff. It is unreasonable to give the plaintiffs both the goods and the money which was paid to prevent their being sold, which is what this decision does. The execution creditor had a right to have this property sold before a receiver was appointed, and the subsequent appointment of a receiver cannot take away this right.

T. B. Napier, for the plaintiffs, was not called upon.

LINDLEY L.J. In my opinion this case presents no real difficulty. On February 9, 1895, the appellants recovered judgment against the Birmingham Ammunition Company for 51*l.* 12*s.* and costs, and levied execution on the 14th. On the 16th the debenture-holders of the Birmingham Company commenced an action to enforce their securities by appointment of a receiver, and on the 18th notice of the action was given, and the sheriff was informed that the plaintiffs claimed the goods he had seized. On February 20 the debenture-holders were informed that the sheriff would sell next day. On the 21st the writ in the present action was issued, and an injunction extending over the next day was granted ex parte. On the 22nd a receiver was appointed in the former action. There had been no sale of the goods seized.

The other important matter to be noticed is that on February 21 the solicitor of the debenture-holders paid to the sheriff the amount of the appellants' judgment debt and costs, the payment being accompanied by this letter. [His Lordship read the letter in the report in the Court below.] The meaning of this letter is, "I lodge in your hands 70*l.* 5*s.* 6*d.* under protest and without prejudice to any rights of my clients." The goods never were sold, and this sum was evidently a sum placed in the hands of the sheriff to abide the result of proceedings for ascertaining the rights of the parties.

Who, then, are entitled to this money? What are the rights of the debenture-holders under their securities? Their debentures

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certainly gave them an equitable charge on the assets, and a right, when the moneys payable under the debentures were due, to obtain the appointment of a receiver. They obtained the appointment of one before the goods were sold, and the duty of the sheriff therefore was not to sell; it having been decided in *In re Opera, Limited* (1), that the rights of debenture-holders prevail against an execution creditor at all events until sale. It was urged that the execution creditors here had acquired a right to have the property sold before a receiver was appointed. But had they acquired such a right? The sheriff had notice of the debenture-holders' action, and if he had interpleaded as he ought to have done, the judge in chambers would have been informed of the action, he would have postponed his decision till he saw what became of it, and the result would have been that there would have been no sale. The debenture-holders asserted their rights in time to stop the sale and payment of the proceeds to the execution creditors. If the goods had been sold and the proceeds paid to the execution creditors that would have been quite another case, on which I do not give any opinion. If the sheriff had interpleaded on February 18, as he ought to have done when he received notice of the debenture-holders' action, the appellants would never have obtained sale of these goods and payment of the proceeds to them.

LOPES L.J. In my opinion there never was any sale at all of these goods. The 70*l.* 5*s.* 6*d.* was not purchase-money, but money deposited with the sheriff to abide the event. Before any sale had taken place a receiver was appointed. The debenture-holders did all they could have done to assert their rights. The proper course would have been for the sheriff, on receipt of the notice of the 18th, to obtain an interpleader issue, and if he had done so the goods would have ultimately come to the hands of the debenture-holders. I am not prepared to say how the case would have stood if there had been a sale, or a sale and payment of the proceeds to the execution creditors.

KAY L.J. Mr. Ryland's very ingenious argument fails to persuade me. If we look at the facts it is clear that there was

(1) [1891] 3 Ch. 260.

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no sale. The sale was prevented by the payment made to the sheriff's officer on behalf of the debenture-holders, and on February 22 the debenture-holders obtained an order appointing a receiver. Their security then attached on all the property belonging to the company at that time, including goods taken in execution which had not been sold. The case stands on much the same footing as if the money had been paid into Court: it was paid to the sheriff's officer by the debenture-holders in order to make it impossible to sell. They did all they could to assert their title, and took all precautions to make themselves safe when they paid the money. They did not mean by paying it to decide any right, but as is clearly shewn by the terms of the letter accompanying the payment, they paid it to abide the result of their action for a receiver. In the events which have happened the money belongs to the persons who paid it in, and not to the execution creditors.

Solicitors: *Belfrage & Co., for Reece, Harris & Harris, Birmingham*; *Barlow & James, for P. M. Butlin, Birmingham.*

H. C. J.

BRODERIP *v.* SALOMON.

C. A.
1894
VAUGHAN WILLIAMS J.
Nov. 8, 9, 20.
1895
Feb. 14.
C. A.
May 7, 8, 28.

[1893 B. 4793.]

Private Company—One-man Company — Limited Liability—Sole Trader—Winding-up—Liability to indemnify Company in respect of Debts.

S., a solvent trader, being desirous of carrying on his business with limited liability, caused a limited company to be registered for that purpose with a nominal capital of 40,000*l.* in 1*l.* shares. The memorandum of association was subscribed by himself, his wife, his daughter, and his four sons, for one share each, i.e. for seven shares in all. Twenty thousand shares were afterwards allotted to S., but no other shares in the company than the above 20,007 were ever taken. Debentures forming a floating security on the capital were issued to S. in part payment of the amount for which he purported to sell his business to the company. The business went on under the management of S. as managing director, and in a few months an order was made for winding up the company compulsorily. Vaughan Williams J. held that the company was the mere nominee of S.; that if his nominee had been an individual the nominee could have called on S. as his principal to indemnify him from the business liabilities; that

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the fact of the nominee being a company made no difference; and that S. must indemnify the company against the debts which its assets were insufficient to pay. S. appealed:—

Held, by the Court of Appeal, that the formation of the company and the issue of the debentures were a mere scheme to enable S. to carry on business in the name of the company with limited liability contrary to the true intent and meaning of the Companies Act, 1862, and to enable him to obtain priority over other creditors of the company by means of the debentures, and that the appeal must be dismissed.

In re British Seamless Paper Box Co. (17 Ch. D. 467) distinguished.

THIS was an appeal by Aron Salomon from an order of Vaughan Williams J. which, in effect, ordered him to indemnify a limited company formed by him against the unsecured debts and liabilities incurred by or in the name of the company while it carried on business.

Aron Salomon carried on business as a leather merchant and hide factor, wholesale and export boot manufacturer, and Government contractor, in Whitechapel, and became desirous of forming a company to take over his business. On July 20, 1892, an agreement was entered into between him and a trustee for a company intended to be formed, by which (1.) Aron Salomon agreed to sell, and the trustee, as such trustee, to buy, the goodwill of the business and the trade-marks for 7500*l.*, to be paid in cash within three weeks after the registration of the company. (2.) The vendor agreed to sell and the trustee to buy the fixtures, fittings, and effects transferable by delivery for 6000*l.*, to be paid in cash within the same period. (3.) The vendor agreed for ten years not to carry on the same business within twenty-five miles from any of the business premises. (4.) That the company should purchase the stock-in-trade at the date of the agreement for 16,000*l.*, to be paid within three weeks after registration either wholly in cash or in debentures of the company, or partly in cash and partly in debentures, as the company should elect, the debentures to be secured on the property and effects of the company, including any uncalled capital. (5.) That the company should purchase the bills in hand and book debts at the figures at which they stood in the balance-sheet made out by the vendor on May 31, the company to make payment in cash. (6.) That the company

should purchase the interest of the vendor in the leasehold premises of the business for 2500*l.*, to be paid in cash within three weeks after registration. (7.) The vendor agreed, subject to the consent of the landlord, to assign the leases or grant under-leases to a trustee for the company. (8.) The purchase was to take effect as from June 1, 1892, and was to be completed on August 4, 1892. (9.) Until completion the business was to be carried on by the vendor in the usual manner; and as from and after the day next preceding August 4, 1892, he was to be considered as carrying it on for the benefit of the company, and was to account to the company for the benefits received therefrom. (10.) That the vendor should pay and discharge all the debts and liabilities of him the vendor in and about the business which were subsisting on June 1, 1892, and indemnify the company against them. (11.) That the vendor should discharge all outgoings in respect of the leaseholds to June 1, 1892.

The total purchase-money (including the price of book debts, which stood at 6782*l.* 19*s.* 7*d.*) was 38,782*l.* 19*s.* 7*d.*

In framing this agreement and in arriving at the sums to be paid by the company, no one acted on behalf of the proposed company, of which A. Salomon himself was the promoter. His books were made up by an accountant employed by him, no one else had anything to do with the matter, and he in fact settled the figures and dictated the terms to be found in the agreement. The prices which the company was to pay considerably exceeded the amounts appearing in the balance-sheet. At the date of the agreement Salomon owed 7679*l.* 12*s.* 6*d.*, but his business was solvent.

On July 28, 1892, a limited company was registered for the purpose of carrying out the above agreement, with such modifications (if any) as might be agreed to, and of carrying on A. Salomon's business. The nominal capital was 40,000*l.*, divided into 40,000 shares of 1*l.* each. The memorandum of association was subscribed by Aron Salomon and his wife and daughter and his four sons, each subscribing for one share. Aron Salomon afterwards had 20,000 shares allotted to him. No one else ever had a share in the company.

By clause 50 of the articles of association, at a general meeting

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every member was to have one vote for every share held by him; so that Aron Salomon, after the allotment of 20,000 shares, could outvote all the other shareholders. By clause 57 the first directors were to be nominated by a majority of the subscribers to the memorandum of association. By clause 58 the directors were never to be less than three or more than five. By clause 59 the qualification of a director was that he was a shareholder. By clause 60 the remuneration of the directors was to be determined in general meeting. By clause 61 it was provided that the business should be managed by the directors, and that they might exercise all such powers of the company as were not by any Act or by the articles required to be exercised in general meeting. By clause 62 (*a*) it was provided that "they may borrow any sum or sums of money on such security and upon such terms as to interest or otherwise as they deem fit, and may secure the same by mortgage or other debentures or bonds or by mortgage in any form of the whole or any part of any property, funds, assets, or effects of the company, including uncalled capital: Provided that the directors shall not, without the sanction of a general meeting of the company, borrow any sum of money exceeding 10,000*l.*"

"(*b*) They may from time to time appoint any person being a shareholder in the company (whether a member of the board or not) to be managing director or managing directors on such terms as to remuneration or otherwise with such powers and for such period as they deem fit."

By clause 74 the directors were empowered to determine the quorum of directors, and it was provided that until otherwise fixed the quorum should be three. Questions were to be decided by a majority of votes, and in case of an equality of votes the chairman was to have a casting vote.

On August 2, 1892, the subscribers to the memorandum of association met, and appointed Aron Salomon and two of his sons to be the first directors. The remuneration of the managing director was fixed at 500*l.* a year, and the remuneration of the other two at 148*l.* a year each.

On the same August 2 the first meeting of directors was held. Aron Salomon was appointed chairman, and Asher Salomon, one

of his sons, secretary. Aron Salomon was appointed managing director, and it was resolved that two directors should form a quorum. It was further resolved that the agreement of July 20, 1892, should be adopted by the company without modification, except that the time for completion should be extended to September 4, 1892. It was further resolved to make payment for the stock-in-trade, the price of which had been fixed by the agreement of July 20, 1892, at 16,000*l.*, as to 6000*l.* in cash, and as to 10,000*l.* in debentures of the company of 100*l.* each. The balance-sheet referred to in the agreement of July 20, 1892, was produced; the bills and book debts mentioned in the agreement were found to stand therein at 6782*l.* 19*s.* 7*d.*, and it was resolved that a cheque should be forthwith drawn for that amount in favour of Aron Salomon. It was further resolved that Aron Salomon should be called upon to execute a declaration of trust of the leases, and that upon his execution of it 2500*l.* cash should be paid to him. It was also resolved to issue seven shares to the seven subscribers to the memorandum of association.

On August 12, 1892, the second meeting of directors was held, and a formal agreement in pursuance of the resolution of the previous meeting, adopting the agreement of July 20, 1892, was sealed on behalf of the company, a counterpart having been previously signed by Aron Salomon, and dated August 2, 1892.

On September 5, 1892, the third meeting of directors was held, at which it was resolved that the seal of the company should be affixed to debentures to be issued to Aron Salomon. It was also resolved that 20,000 shares should be allotted to Aron Salomon, he having applied for them.

At the fourth meeting of directors on January 26, 1893, debentures for 10,000*l.* were sealed and delivered to Aron Salomon.

At the fifth meeting of directors on February 5, 1893, the resolution of January 26, 1893, was rescinded and the debentures cancelled. At the same meeting debentures for 10,000*l.* were, at the request of Aron Salomon, issued to Edmund Broderip, as a security for 5000*l.* lent by him to Aron Salomon, which sum Aron Salomon shortly afterwards lent to the company at 10*l.* per cent. interest under an agreement dated February 6, 1893.

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The company having made default in payment of the interest due on these debentures, Mr. Broderip in September, 1893, gave notice to call in the principal, and on October 11, 1893, commenced his action on behalf of himself and all the debenture-holders to enforce his security, and on October 25, 1893, the official receiver was appointed receiver and manager. On October 26 an order was made for compulsory winding up of the company. The company put in a defence and counter-claim in the action, making Aron Salomon a party to the counter-claim, and alleging that the arrangements made by Aron Salomon for the formation of the company were a fraud on the creditors of the company, and ought to be set aside; that Aron Salomon was the promoter of, and stood in a fiduciary relation to, the company; and that the company was entitled to have the agreements of July 20 and August 2, 1892, rescinded, to have the 10,000*l.* debentures delivered up to be cancelled, and to have judgment against Aron Salomon for 29,257*l.* 18*s.* 1*d.* with interest (that being the amount which the company alleged Aron Salomon to have received in cash), and a declaration that the company was entitled to a lien on the business and assets for payment thereof. In the alternative, the company claimed a declaration that the company or its liquidator was entitled to be indemnified by Aron Salomon against 7733*l.* 8*s.* 3*d.*, the amount by which the assets of the company were found in the winding-up to be insufficient for payment of its debts, judgment against him for that sum, a declaration that the company had a lien for that sum on all sums which would be payable to him out of the assets in respect of the debentures or otherwise, and that he was not entitled to make any claim against the assets of the company until that sum had been satisfied.

The values set by Aron Salomon on his assets had not been examined or checked by any one on behalf of the company after its formation, any more than before. The liquidator contended that the values put upon those assets were excessive.

The action was tried before Vaughan Williams J. on November 8 and 9, 1894.

Farwell, Q.C., and *Theobald*, for the company.

McCall, Q.C., and *Muir Mackenzie*, for Aron Salomon.
Kenyon Parker, for the plaintiff.

1894. Nov. 20. The case was placed in the paper to be mentioned again, when the following statement was made :—

VAUGHAN WILLIAMS J. I am perfectly certain that each one of the shareholders in this company was perfectly well aware of all that was done with regard to the purchase by the company of Mr. Salomon's business. The shareholders were all of full age, and the number of shareholders, as it existed at first, continued throughout the life of the company down to the liquidation. There never was any intention of offering the shares in the company to the public. It was what the late Master of the Rolls in *In re British Seamless Paper Box Co.* (1) called a "private company;" but, on the other hand, I am perfectly convinced that the shareholders, who were all members of the family of Mr. Salomon, were nominees of Mr. Salomon, and that no real interest was ever given to them in the company, and I do not believe that it was ever intended to give them any real interest whatsoever in the company.

Now, in these circumstances the legal position seems to me to be this. I do not think that where you have a private company, and all the shareholders in the company are perfectly cognizant of the conditions under which the company is formed and the conditions of the purchase by the company, you can possibly say that purchasing at an exorbitant price (and I have no doubt whatever that the purchase here was at an exorbitant price) is a fraud upon those shareholders or a fraud upon the company. Of course, purchasing at an exorbitant price may be a fraud, even if all the shareholders know of it, if there is an intention to allot further shares at a later period to future allottees. But that is not, and was not, the case here.

It seems to me, however, that when one considers the fact that these shareholders were mere nominees of Mr. Salomon's, that he took the whole of the profits, and that his intention was to take the profits without running the risk of the debts and

(1) 17 Ch. D. 467, 473.

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expenses, one must also consider the position of the unsecured trading creditors, whose debts amount to some 11,000*l.* As I have said, the company was a mere nominee of Mr. Salomon's, and it does not seem to me that it ought to make the slightest difference whether the nominee is a company or an individual—a person; and therefore I wish, if I can, to deal with this case exactly on the basis that I should do if the nominee, instead of being a company, had been some servant or agent of Mr. Salomon to whom he had purported to sell this business.

Now, in those circumstances it seems to me that the suggestion, which I think came from myself in the course of the argument, with regard to the statute of Elizabeth, cannot be applied. If the liquidator here were trustee under the bankruptcy of Mr. Salomon, I should have no hesitation, at the instance of the trustee, in making the declaration necessary to bring this property and the assets of this company, notwithstanding the debentures which were issued, into the general estate of Mr. Salomon in bankruptcy. But this is not the case of the bankruptcy of Mr. Salomon. Mr. Salomon is solvent. The liquidation is a liquidation under the winding-up of the company. It seems to me that in that winding-up, quâ winding-up, I have no jurisdiction to make any order against Mr. Salomon; but this matter does not come before me in the liquidation. The claim against him is made on behalf of the agent company in liquidation. Now, in these circumstances, if the agent had been an individual and not the company, what would have been the rights of the trustee in the bankruptcy of the agent? Why, his right would have been this. He would have had a right, notwithstanding the debentures and notwithstanding the form of the agreement between the principal and agent, treating them as strangers contracting, to make Mr. Salomon indemnify the agent against the debts that he had contracted by the direction of his principal; and, so far as I can judge at present (I have not had the matter argued), the right of the liquidator in the liquidation is precisely the same, notwithstanding the debentures, which were a mere form, intended to give an appearance of reality to a sale which, in fact, was no sale at all, because it was a sale by a man to an agent for his own

profit. I say, in spite of that, it seems to me that the liquidator is entitled, as an asset of this company, to make Mr. Salomon indemnify the company against the debts which have been contracted at his bidding and for his benefit.

Generally speaking, an agent in such circumstances would have a lien upon the assets of the company; at least, that is my view at present without having the matter argued. I very much doubt whether the form which has been gone through with regard to the debentures in any way interferes with that lien. I have said what, as I am at present advised, occurs to me as being the law applicable to this case, but that which I have suggested as being the remedy of the liquidator is not the remedy which he has asked for. I propose, therefore (subject to anything which may be said on behalf of Mr. Salomon), to allow the pleadings to be amended, so that this remedy may be asked for; and I cannot deliver my judgment until the case has been argued on the amended pleadings.

1895. Feb. 14. The necessary amendments having been made, the case was again placed in the paper, and the same counsel again appeared.

VAUGHAN WILLIAMS J. No charge of fraud covered by my previous observations is involved in the amended claim; but to allow a man who carries on business under another name to set up a debenture in priority to the claims of the creditors of the company would have the effect of defeating and delaying his creditors. There must be an implied agreement by him to indemnify the company. Under the Companies Act of 1862 a man may become what is called a private company so as to obtain the benefits of limited liability. I have already held, in a case where the founder of such a company had become bankrupt and the company claimed his assets, that the company was a mere fraud, and the Court of Appeal supported that decision. In this case I propose to hold the same thing—that this business was Mr. Salomon's business and no one else's; that he chose to employ as agent a limited company; that he is bound to indemnify that agent, the company; and that his agent, the

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company, has a lien on the assets which overrides his claims. The creditors of the company could, in my opinion, have sued Mr. Salomon. Their right to do so would depend on the circumstances of the case, whether the company was a mere alias of the founder or not. In this case it is clear that the relationship of principal and agent existed between Mr. Salomon and the company. It would not serve any useful purpose to add to what I said in November, as it is probable that there will be an appeal. But there is one matter, a consequential matter, about which I wish to say something. As long as the pleadings stood as they originally did, in my opinion the statute of Elizabeth could have no application whatever, because the creditors who were alleged to be defeated and delayed were the creditors of the company. But the moment they amend the pleadings, and allege and succeed in establishing the identity of Mr. Salomon with the company, the creditors of the company thereupon are shewn to be the creditors of Mr. Salomon; and, although it is necessary, in order to get rid of the priority given to Mr. Salomon by these debentures, that one should fall back upon the lien of the company as his agent, whom he was bound to indemnify, I do not mean to exclude from my judgment that the debentures were given to Mr. Salomon by his agent, the company, and that the necessary effect of Mr. Salomon, as principal, taking these debentures from his agent, the company, was that his creditors—for, according to my view, the creditors of the company were his creditors—were defeated and delayed by the debentures.

His Lordship made the following order:—

Declare that the plaintiffs A. Salomon & Co., Limited, or the liquidator thereof, are or is entitled to be indemnified by the defendant A. Salomon against the sum of 7733*l.* 8*s.* 3*d.* in the reamended statement of defence and counter-claim delivered in this action mentioned.

Order and adjudge that the plaintiffs A. Salomon & Co., Limited, do recover against defendant A. Salomon the said sum of 7733*l.* 8*s.* 3*d.*

Declare that plaintiffs A. Salomon & Co., Limited, are entitled to a lien for the said sum of 7733*l.* 8*s.* 3*d.*, upon all sums which would be payable to defendant A. Salomon out of the assets of the plaintiffs A. Salomon & Co., Limited, in respect of the debentures issued by the said company to the defendant E. Broderip in the pleadings mentioned or otherwise, and that the

defendant A. Salomon is not entitled to make any claim against the assets of the plaintiffs A. Salomon & Co., Limited, until the said sum of 7733*l.* 8*s.* 3*d.* has been satisfied.

F. E.

Aron Salomon gave notice of appeal. The company gave a counter-notice of contention that they were entitled to have the agreements of July 20 and August 2, 1892, rescinded, and to have the 10,000*l.* mortgage debentures delivered up to be cancelled, subject to the payment of the principal, interest, and costs due to Broderip, and that they were entitled to judgment against A. Salomon for 29,257*l.* 8*s.* 1*d.*, the amount of the sums of cash paid to him, with interest from the times of payment, and to a lien upon the business and assets for that sum with interest. The appeal came on for hearing on May 7, 1895.

Buckley, Q.C., and *Muir Mackenzie* (*McCall, Q.C.*, with them), for the appellant. The learned judge has held that the company was a mere alias for Salomon, that it was his agent, and that he is bound to indemnify the company against its obligations. There is no foundation for that conclusion. The transaction was a purchase by the company of the business, which was at that time a valuable one, with the assets and lease of the premises. There was nothing to constitute the relation of principal and agent between Salomon and the company. He paid off the existing debts, and his object was to limit his liability for the future by transferring the business to a limited company. There is nothing contrary to the policy of the Companies Acts in that. The assets belong to the corporation, and the creditors look to them for their security. The corporation has always a separate existence from the shareholders. It is competent for one shareholder to obtain substantially the whole interest in the business, if all the other shareholders acquiesce. The creditors cannot inquire whether the shareholders are trustees or not: *In re George Newman & Co.* (1); *In re Von Weissenfeld.* (2) The judge has decided that the corporation is an agent because one corporator is beneficially entitled to all the shares. That, we contend, is not law. There is nothing in the Companies Act, 1862, to prevent a man from associating six other persons with himself

(1) [1895] 1 Ch. 674. (2) 9 Morrell, 30, 37.

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to form a limited company, nor is there anything in the Act to prevent such six persons from being trustees for him. It is not very plain why a plurality of shareholders is required; but there is nothing to shew that they must be beneficial owners of their shares. The Act prohibits all inquiry as to who are beneficial owners, for it excludes notice of trusts. The whole practice of the Court will be thrown into uncertainty if this decision is upheld. The rights under the Act are well defined. Suppose seven persons holding shares equally, and six of them become trustees for the seventh, he is virtually sole owner, but the company goes on as a limited company. You cannot look at this Act in any other way than by disregarding equitable rights to shares. The only question is whether there are seven members on the register. If there are, the Court cannot enter into the question whether one is a trustee for another. The decision in *In re Bowling and Welby's Contract* (1) proceeds on a similar principle. The company can only sue as representing shareholders, and here no shareholder is aggrieved.

Farwell, Q.C., and *Theobald*, for the company. The judge here has held that there was no real sale to a limited company; the whole transaction was a sham. It is needless to enter into the question whether the company was validly incorporated; if it was, it was an agent for Aron Salomon, who in fact carried on his old business under the name of a limited company. The sale was a sham; there was no valuation, no stock-taking, no account of profits; there were no materials on which a bargain for a real sale could be entered into. The judge finds in our favour as a matter of fact that there was no real sale—that Aron Salomon remained owner. It would be a most unfortunate thing if a trader could limit his liability by the device of using the name of a limited company. If he thus used the name of an impecunious individual he clearly could not escape.

[The Court postponed the hearing of the cross-notice of appeal till they had heard a reply on A. Salomon's appeal.]

Buckley, Q.C., in reply. The respondents say there is no real sale because there was no valuation and no bargaining for a price.

(1) [1895] 1 Ch. 663.

In one sense there was no contract for sale, but in a material sense there was. There was a real bargain, though not arrived at by hostile bargaining. The test whether there was a real sale is—Could Aron Salomon have come to the company and said, "Hand me back my business and its assets"? We submit he clearly could not.

[The Court then called for the cross-appeal.]

Farwell, Q.C., and *Theobald*, for the company. We say we are entitled to have the contract for sale to the company rescinded, and we rely on the principles laid down in *Erlanger* v. *New Sombrero Phosphate Co.* (1) To make such a contract valid there must be a board of directors who are competent and impartial judges as to whether the contract should be made. The question what the company is to give back if the contract is rescinded is answered by *Adam* v. *Newbigging* (2), where the same argument was used as here—that restitutio in integrum had become impossible. We contend that the judge below was wrong in saying that, as all the shareholders were satisfied, the transaction was morally right. The shareholders were merely nominal; there was no real transaction at all. The case of *In re British Seamless Paper Box Co.* (3) was special, and turns on the bona fides of the transaction; here there was really no transaction. It has been urged on the other side that the company can only sue as representing shareholders, and that here no shareholder is aggrieved; but the company owes a duty to its creditors, and wishes to have money wherewith to pay its debts. The assent of all the shareholders cannot be assumed as Vaughan Williams J. has done; there must be a formal meeting of shareholders approving of the transaction: Buckley on Companies, 6th ed. p. 576. Why did not Aron Salomon do as almost all persons turning their business into a limited company do—take payment chiefly in fully paid-up shares? Doubtless because he wished to avoid registering a contract which must have stated the consideration and shewn the real nature of what was being done.

Buckley, Q.C., and *Muir Mackenzie*, for Aron Salomon. On

(1) 3 App. Cas. 1218, 1236. (2) 13 App. Cas. 308, 330.
(3) 17 Ch. D. 467.

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the first appeal the company say that there was no sale, that Aron Salomon carried on business in the name of the company, and that the business was still his. On the second appeal they treat the sale as effectual, and ask to have it set aside. In *Erlanger* v. *New Sombrero Phosphate Co.* (1), and other cases of that class, it was intended that other shareholders should come in; if there are not other persons to come in and be deceived the bargain is not to be set aside: *In re Ambrose Lake Tin and Copper Mining Co.* (2) There was a sale to Broderip which makes rescission impossible, for there cannot be restitutio in integrum.

Farwell, Q.C., in reply. *In re Ambrose Lake Tin and Copper Mining Co.* (2) turns on the liquidator having sought the wrong remedy. The Court treats the right to relief as clear if the proper course were taken by the right parties. Broderip's debentures were only issued on the nomination of Aron Salomon, and the dealing with them cannot possibly be called a sale.

Cur. adv. vult.

1895. May 28. LINDLEY L.J. This is an appeal by Mr. Aron Salomon against an order made by Vaughan Williams J., and which, in effect, directs Mr. A. Salomon to indemnify a limited company formed by him against the unsecured debts and liabilities incurred by or in the name of the company whilst it carried on business.

The appeal raises a question of very great importance, not only to the persons immediately affected by the decision, but also to a large number of persons who form what are called "one-man companies." Such companies were unheard of until a comparatively recent period, but have become very common of late years.

The material facts of this case are as follows: [His Lordship, after stating the facts of the case to the same effect as above, and adding that as to the 20,000 shares allotted to Aron Salomon he (Aron Salomon) contended he had paid for them though no call had ever been made; that the liquidator, on the other hand, claimed 20,000*l.* from A. Salomon in respect of these shares; that

(1) 3 App. Cas. 1218. (2) 14 Ch. D. 390.

A. Salomon had received moneys from the company, but that it did not appear whether he had paid the company for his shares, and that this was a matter which it was unnecessary to pursue further on the present occasion, proceeded as follows:—]

I proceed to examine the legal aspect of this case, which, as I have said, is one of great general importance. There can be no doubt that in this case an attempt has been made to use the machinery of the Companies Act, 1862, for a purpose for which it never was intended. The legislature contemplated the encouragement of trade by enabling a comparatively small number of persons—namely, not less than seven—to carry on business with a limited joint stock or capital, and without the risk of liability beyond the loss of such joint stock or capital. But the legislature never contemplated an extension of limited liability to sole traders or to a fewer number than seven. In truth, the legislature clearly intended to prevent anything of the kind, for s. 48 takes away the privileges conferred by the Act from those members of limited companies who allow such companies to carry on business with less than seven members; and by s. 79 the reduction of the number of members below seven is a ground for winding up the company. Although in the present case there were, and are, seven members, yet it is manifest that six of them are members simply in order to enable the seventh himself to carry on business with limited liability. The object of the whole arrangement is to do the very thing which the legislature intended not to be done; and, ingenious as the scheme is, it cannot have the effect desired so long as the law remains unaltered. This was evidently the view taken by Vaughan Williams J.

The incorporation of the company cannot be disputed. (See s. 18 of the Companies Act, 1862.) Whether by any proceeding in the nature of a scire facias the Court could set aside the certificate of incorporation is a question which has never been considered, and on which I express no opinion; but, be that as it may, in such an action as this the validity of the certificate cannot be impeached. The company must, therefore, be regarded as a corporation, but as a corporation created for an illegitimate purpose. Moreover, there having always been seven members,

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although six of them hold only one *l.* share each, Mr. Aron Salomon cannot be reached under s. 48, to which I have already alluded. As the company must be recognised as a corporation, I feel a difficulty in saying that the company did not carry on business as a principal, and that the debts and liabilities contracted in its name are not enforceable against it in its corporate capacity. But it does not follow that the order made by Vaughan Williams J. is wrong. A person may carry on business as a principal and incur debts and liabilities as such, and yet be entitled to be indemnified against those debts and liabilities by the person for whose benefit he carries on the business. The company in this case has been regarded by Vaughan Williams J. as the agent of Aron Salomon. I should rather liken the company to a trustee for him—a trustee improperly brought into existence by him to enable him to do what the statute prohibits. It is manifest that the other members of the company have practically no interest in it, and their names have merely been used by Mr. Aron Salomon to enable him to form a company, and to use its name in order to screen himself from liability. This view of the case is quite consistent with *In re George Newman & Co.* (1) In a strict legal sense the business may have to be regarded as the business of the company; but if any jury were asked, Whose business was it? they would say Aron Salomon's, and they would be right, if they meant that the beneficial interest in the business was his. I do not go so far as to say that the creditors of the company could sue him. In my opinion, they can only reach him through the company. Moreover, Mr. Aron Salomon's liability to indemnify the company in this case is, in my view, the legal consequence of the formation of the company in order to attain a result not permitted by law. The liability does not arise simply from the fact that he holds nearly all the shares in the company. A man may do that and yet be under no such liability as Mr. Aron Salomon has come under. His liability rests on the purpose for which he formed the company, on the way he formed it, and on the use which he made of it. There are many small companies which will be quite unaffected by this decision. But there may possibly be

(1) [1895] 1 Ch. 674.

some which, like this, are mere devices to enable a man to carry on trade with limited liability, to incur debts in the name of a registered company, and to sweep off the company's assets by means of debentures which he has caused to be issued to himself in order to defeat the claims of those who have been incautious enough to trade with the company without perceiving the trap which he has laid for them.

It is idle to say that persons dealing with companies are protected by s. 43 of the Companies Act, 1862, which requires mortgages of limited companies to be registered, and entitles creditors to inspect the register. It is only when a creditor begins to fear he may not be paid that he thinks of looking at the register; and until a person is a creditor he has no right of inspection. As a matter of fact, persons do not ask to see mortgage registers before they deal with limited companies; and this is perfectly well known to every one acquainted with the actual working of the Companies Acts and the habits of business men. Mr. Aron Salomon and his advisers, who were evidently very shrewd people, were fully alive to this circumstance.

If the legislature thinks it right to extend the principle of limited liability to sole traders it will no doubt do so, with such safeguards, if any, as it may think necessary. But until the law is changed such attempts as these ought to be defeated whenever they are brought to light. They do infinite mischief; they bring into disrepute one of the most useful statutes of modern times, by perverting its legitimate use, and by making it an instrument for cheating honest creditors.

Mr. Aron Salomon's scheme is a device to defraud creditors.

Agreeing as I do in substance with Vaughan Williams J., I do not think it necessary to investigate the question whether the so-called sale of the business to the company ought to be set aside. The only object of setting it aside is to obtain assets wherewith to pay the creditors, and this object can be attained on sound legal principles by the order which he has made. In the event, however, of this case going further, I will add that I regard the so-called sale of the business to the company as a mere sham, and that in my opinion it might, if necessary, be set aside by the company in the interest of its creditors, although

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all the shareholders, such as they were, knew of and assented to the arrangement. They were simply assisting Mr. Aron Salomon to carry out his scheme. I cannot regard *In re British Seamless Paper Box Co.* (1) as an authority against a rescission of such a transaction as this.

We have carefully considered the proper form of order to be made on this appeal, and the order of the Court will be as follows: The Court, being of opinion that the formation of the company, the agreement of August, 1892, and the issue of debentures to Aron Salomon pursuant to such agreement, were a mere scheme to enable him to carry on business in the name of the company with limited liability, contrary to the true intent and meaning of the Companies Act, 1862, and, further, to enable him to obtain a preference over other creditors of the company by procuring a first charge on the assets of the company by means of such debentures, dismiss the appeal of Aron Salomon with costs; and, it being unnecessary to make any order on the liquidator's cross-notice of appeal, discharge the order directing the liquidator to pay costs of the counter-claim, and give him those costs.

LOPES L.J. This is a case of very great importance, and I wish shortly to state my reasons for concurring in the judgment just delivered. I do not propose to restate the facts so fully and clearly detailed by Lindley L.J.: I shall content myself with shortly stating the impression they have produced on my mind. The incorporation of the company was perfect—the machinery by which it was formed was in every respect perfect, every detail had been observed; but, notwithstanding, the business was, in truth and in fact, the business of Aron Salomon; he had the beneficial interest in it; the company was a mere nominis umbra, under cover of which he carried on his business as before, securing himself against loss by a limited liability of 1*l.* per share, all of which shares he practically possessed, and obtaining a priority over the unsecured creditors of the company by the debentures of which he had constituted himself the holder.

It would be lamentable if a scheme like this could not be

(1) 17 Ch. D. 467.

defeated. If we were to permit it to succeed, we should be authorizing a perversion of the Joint Stock Companies Acts. We should be giving vitality to that which is a myth and a fiction. The transaction is a device to apply the machinery of the Joint Stock Companies Act to a state of things never contemplated by that Act—an ingenious device to obtain the protection of that Act in a way and for objects not authorized by that Act, and in my judgment in a way inconsistent with and opposed to its policy and provisions. It never was intended that the company to be constituted should consist of one substantial person and six mere dummies, the nominees of that person, without any real interest in the company. The Act contemplated the incorporation of seven independent bonâ fide members, who had a mind and a will of their own, and were not the mere puppets of an individual who, adopting the machinery of the Act, carried on his old business in the same way as before, when he was a sole trader. To legalize such a transaction would be a scandal.

But to what relief is the liquidator entitled? In the circumstances of this case it is, in my opinion, competent for the Court to set aside the sale as being a sale from Aron Salomon to himself—a sale which had none of the incidents of a sale, was a fiction, and therefore invalid; or to declare the company to be a trustee for Aron Salomon, whom Aron Salomon, the cestui que trust, was bound to indemnify; or to declare the formation of the company, the agreement of August, 1892, and the issue of the debentures to Aron Salomon pursuant to such agreement, to be merely devices to enable him to carry on business in the name of the company with limited liability, contrary to the true intent and meaning of the Companies Act, 1862, and further, to enable him to obtain a preference over other creditors of the company by obtaining a first charge on the assets of the company by means of such debentures. I wish to add that I am inclined to think that a scire facias would go to repeal the certificate of incorporation; but I express no decided opinion on the point. The appeal will be dismissed with costs.

KAY L.J. Mr. Aron Salomon was carrying on in 1892 a business as a leather merchant and boot maker. He was desirous,

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as his counsel tells us, and as indeed is apparent from the circumstances, to extend his business and to trade in future with limited liability. He owed 7679*l.* 12*s.* 6*d.*, but his business was solvent. He employed an accountant to make out a balance-sheet dated May 31, 1892, in which the value of the leasehold premises in which the business was carried on and of the goodwill was entered at 10,000*l.*, and other assets of the business were included, making a total of 30,978*l.*, leaving an estimated balance, after paying liabilities, of 23,279*l.* Most of these items were taken from his books, and of course all the information obtained by the accountant came from Mr. Salomon or his books. He says that no actual valuations were made. By another document, dated June 1, 1892, this amount was apportioned—Goodwill 7500*l.*, leases 2500*l.*, and the stock-in-trade was raised in value from 9920*l.* to 16,000*l.* Then Mr. Salomon went to work. He must have had most careful advice. Nothing could be more formal and regular than his proceedings. First of all he entered into an agreement, dated July 20, 1892, with a nominee, as trustee for the intended company, to sell to him the business, goodwill, stock-in-trade, leasehold premises, &c., for 38,782*l.* 19*s.* 7*d.* That was a considerable, but perhaps not an unusual, advance upon the valuation. It was moderate compared to cases in which the purchase-money is to be obtained from the public. But in this case that was not the intention. The purchase-money was to be provided by the vendor himself; and a sale by Mr. Salomon of his own property for which he was to find the purchase-money might be expected to be not unreasonable as to price. He admitted in cross-examination that he would not have sold the business. He added that he said at the time he would not sell it for 50,000*l.* That was perhaps a little exaggeration, but it means what is, as I have said, apparent, that he did not intend to sell to any one except himself.

By this preliminary agreement Mr. Salomon covenanted to pay all existing debts and not to trade in opposition to the company, and, in short, all proper provisions were made as though the transaction had been a bonâ fide sale to a third person.

Then a memorandum of association and articles were prepared in a like provident manner, and by the memorandum the com-

pany was to have power, amongst other things, to carry on other people's business as agent, and by the articles the subscribers to the memorandum were to appoint the first directors. Mr. Salomon had a wife and family. Himself, his wife, four sons, and one daughter, all of age, signed the memorandum for one share each. The shares were 1*l.* shares, and there were to be 40,000 of them. The company was to have power to borrow on mortgage or debentures. It was registered on July 28, 1892—of course with limited liability. The proceedings were faultless in point of form. On August 2, 1892, all the seven shareholders—i.e., Mr. Salomon, his wife and children—held a general meeting of the company. They appointed Mr. Salomon and two of his sons directors, and these directors appointed Salomon managing director with a salary of 500*l.* a year, and two of the sons to other offices with 148*l.* a year each. They formally adopted the agreement of July 20, and agreed with the nominal trustee to take over the property on the terms arranged with him. The same day seven shares were allotted to the seven subscribers to the memorandum. On September 5, 1892, 10,000*l.* debentures were issued to Salomon in part payment of the 38,782*l.* Now by these means, if the scheme was successful, Salomon would be enabled to carry on his trade thenceforward with limited liability, and the limit was absolutely 1*l.* But the assets of the business to the value of 10,000*l.* were also his by reason of the debentures which created a first charge to that amount upon them. So that he secured to himself all the assets, and proposed to go on trading with no liability whatever. He seems to have estimated rightly the trustfulness of his customers, and must have relied largely on their actual ignorance of the facts. He proceeded to develop the business. He borrowed in February, 1893, 5000*l.* from a Mr. Broderip, the plaintiff in this action, on security of the 10,000*l.* debentures; and to make the security more proper he surrendered his debentures and obtained a fresh issue of debentures to the same amount to Broderip direct, and these were mortgaged by an agreement dated February 6, 1893. Salomon now claims these debentures, the mortgage having since been paid off in the winding-up. Then another proceeding was this. He affected to receive payment of 20,000*l.* from the company,

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which he applied in buying 20,000 shares. Each share gave a vote, so that all the voting power was in his hands. If any money passed, it is obvious that 1*l.* would have been sufficient. By handing it backwards and forwards in this way the whole 20,000 shares might be acquired. It is suggested that he did not take 20,000 shares in payment of part of the price directly, because he must have registered the agreement making them fully paid-up shares, which would not be convenient in case any customer should discover it. The result was that he obtained sufficient cash, either from the business or from that and Broderip's loan, to pay the 7679*l.* debts, which he paid off, and he took payment from the company of 20,000*l.*, other part of the price of 38,782*l.*, and became the holder of 20,000 shares. No cash was drawn out of the business except a small amount, and not much was added to its funds by these proceedings. But the business was carried on upon a larger scale for about fifteen months with a considerable turnover—Mr. Salomon says at the rate of 50,000*l.* or 60,000*l.* a year. In September, 1893, default was made in paying the interest on the debentures. On October 11, 1893, Broderip commenced the present action to realize the debentures. A receiver was appointed on the 25th, and on the 26th an order was made to wind up the company. A defence and counter-claim was put in by the company, which was now in the hands of the liquidator, who had to provide for 11,264*l.* of unsecured creditors, whose debts had been contracted during the fifteen months of trading which had taken place since the formation of the company. About 7733*l.* of this is due to trade creditors, the rest to Salomon. The counter-claim was amended and reamended, and as reamended it alleged that the company was formed by Salomon and the debentures issued in order that he might carry on the business and take all the profits without risk to himself, and that the company was the mere nominee and agent of Salomon, and it asked to rescind the agreements of July 20 and August 2, 1892, to cancel the debentures, to recover from Salomon the price received from him with interest, and for a lien on the business and assets for the same, or, alternatively, a declaration that Salomon should indemnify the company against the debts due from it.

The liquidator has realized the assets by arrangement without prejudice to any question on the counter-claim. He has paid Broderip's mortgage debt on the debentures, and the rest of the proceeds will not be sufficient to satisfy what remains due on the debentures. Salomon claims whatever there may be as owner of the debentures, and of course he says that he is not liable to the creditors of the company.

It has been argued that all this was a proper and legitimate proceeding under the Joint Stock Companies Acts, and that this result is strictly right and legal; that Salomon wished to trade with limited liability, and the statutes enabled him to do so. It does not matter, it is argued, if the other six signatories of the memorandum were in fact trustees for him. The statutes do not prevent that.

I dissent from this view absolutely. The statutes were intended to allow seven or more persons bonâ fide associated for the purpose of trade to limit their liability under certain conditions and to become a corporation. But they were not intended to legalize a pretended association for the purpose of enabling an individual to carry on his own business with limited liability in the name of a joint stock company.

The question—as was put to counsel during the argument—is, Whose was this business in fact after the formation of the company? There really was no attempt to deny that it was the business of Salomon. The pretended sale to the company was an utter fiction. The company had no funds or property whatever except what it took under this alleged sale and 7*l.* payable on the subscription shares. It borrowed no money. The 10,000*l.* debentures were issued in part of the nominal price. The only security for them was the value of the assets of this business. The company paid nothing to Salomon for the purchase. They had nothing to pay with. There was no pretence of a bargain between the company and Salomon as vendor. There was no independent director to protect the company in the transaction. In truth, there was no purchase and sale at all. The business remained Salomon's. He carried it on in the name of the company.

It seems to me that relief might be given under either alternative

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asked in the counter-claim. If the sale is treated as void or formally set aside, the debentures must be cancelled; and as Salomon says he received 20,000*l.* in cash from the company, that and any other sum, if any, which the company paid to him as part of the price must be repaid with interest at 4 per cent. That would amply provide for the outside creditors. It was faintly suggested that there had been delay, and that there cannot now be a restitution of the property. I do not think delay can be alleged while the company was being altogether managed and dealt with by Salomon himself. Until a liquidator was appointed in the winding-up the company had no independent existence. The point of restitution was guarded against by the sale of the assets being made by consent without prejudice.

Reliance was placed in argument upon *In re British Seamless Paper Box Co.* (1) That was a summons by the official liquidator against four of the seven directors of the company, under s. 165 of the Act of 1862, to make them liable for misfeasance and breach of trust in accepting respectively thirty-five, eighty, fifteen, and fifteen shares, and carrying out an agreement of February 27, 1875. These directors seem to have given value for some of their shares. Some, and, as I understand, those in question, were allotted to them by way of bonus. The agreement mentioned in the summons of February 27, 1875, was an agreement made before the formation of the company between three persons, owners of certain patents, and Bennett, as trustee for the intended company, for the sale to the company of the patents and certain machinery for 32,000*l.* The company was afterwards formed, eight persons signed the memorandum, including the three vendors. Seven of these eight persons, including the vendors, were named directors. They all adopted the agreement and the allotment of shares which had been made. But those eight persons included some who were independent persons, and all eight ratified the proceedings, which the judge found were perfectly bonâ fide. Some time afterwards other persons became shareholders. The Court of Appeal, agreeing with the late Master of the Rolls, held that there was no misfeasance, and that the claim of the liquidator failed.

(1) 17 Ch. D. 467.

The case differs from the present materially. This is not a claim for misfeasance. The liquidator here is proceeding on behalf of the creditors in the name of the company. In this case there were no independent directors or independent shareholders. The wife and children of Salomon were mere trustees for him of one share each; and the question is whether the transaction can be supported so as to enable Salomon to defeat the creditors and appropriate under the debentures the assets to himself. The learned judge has preferred the alternative of treating the company as agent for Salomon. This involves the invalidity of the sale, at least in equity. If it were valid, the business would not belong to Salomon. If there is any difficulty in making Salomon directly liable to the creditors on the ground of the company being his agent, the creditors would equally be secured by treating the company as trustee for Salomon. In either view, Salomon must indemnify the company against the debts and costs. Or the Court might declare the sale invalid, set aside the agreement and debentures, and order Salomon to repay the 38,782*l.*, or that sum less the 10,000*l.* debentures with interest. In one or other of these modes the company is entitled to be indemnified by Salomon against the debentures and the company's debts and the costs.

I agree to the form of order suggested by Lindley L.J.

Solicitors for appellant: *R. Raphael & Co.*

Solicitors for plaintiff: *Rowcliffes, Rawle & Co., for Little & Mills, Stroud.*

Solicitors for the company: *S. M. & J. B. Benson.*

H. C J.

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April 23, 24; *May* 7, 20, 21, 28.

In re LOWMAN.
DEVENISH *v.* PESTER.

[1894 L. 1013.]

Will—Construction—Application to Personal Estate of Limitations framed by mistake as for Real Estate—Repugnancy—Lapse—Perpetuity—Gift Over of Personal Estate after Failure of Issue—Intermediate Income of Legacy —Woman past Child-bearing.

When there are in a will successive limitations of personal estate in favour of several persons absolutely, the first of those persons who survives the testator takes absolutely, although he would have taken nothing if any previous legatee had survived and had taken: the effect of the failure of an earlier gift being to accelerate, not to destroy, the later gift.

Application of this principle to successive limitations, in the forms properly applicable to real estate, of property erroneously supposed by the testator to be unconverted, but in fact converted into personalty.

Dictum of Knight Bruce V.-C. in *Harris* v. *Davis* (1 Coll. 416, 424) dissented from.

A testator, who under a settlement was absolutely entitled (subject to a life estate) to a moiety of the proceeds of a certain real estate under a trust for sale, by his will devised that real estate by its proper description (reciting that he was seised or possessed of it by virtue of the settlement, subject to the life estate), together with certain real estate of his own, to trustees, to the use of H. for life, with remainder to trustees to preserve the contingent remainders, with remainder to the use of the first and other sons of H. successively in tail male, with remainder to the use of the first and other sons of his niece E. successively in tail male, with remainder to the use of the first and other sons of his niece M. successively in tail male, with remainder to the use of the first and other sons of his niece F. successively in tail male, with remainders over.

H. survived the testator and died a bachelor. M. also survived the testator and died unmarried. E. was still alive but unmarried, and seventy years of age. F. had two sons, the eldest of whom died before the testator:—

Held, first, that the testator's moiety of the proceeds of sale passed under the devise of the land.

Secondly, that there was no lapse by reason of the death of the first son of F. before the testator, and that the second son of F. took the moiety of the proceeds of sale absolutely at the death of the testator, subject to the contingency of E. having a son.

Thirdly, that the gift to the second son of F. on failure of issue of the first son was not void under the rule against perpetuities, because the

estate, by the terms of the gift, must vest, if at all, in the lifetime of a person living at the death of the testator.

Fourthly, that, E. being now past child-bearing, the second son of F. was entitled to the intermediate income since the death of the tenant for life.

The decision of Kekewich J. reversed.

APPEAL against a decision of Kekewich J. upon the construction of the will of Hugh Perkins Lowman, who died on March 1, 1864.

By his will, dated May 14, 1859, the testator gave and devised unto two trustees, and their heirs, his messuage and land at Axe, in the parish of Broadwinsor, in the county of Dorset, and also all the freehold messuages, lands, tenements, and hereditaments situate in the several parishes of Crewkerne and Wayford, in the county of Somerset, which he was seised or possessed of under or by virtue of the settlement made on the marriage of his late niece, M. F. Richards, with E. E. Richards, subject to the life interest of the said E. E. Richards therein, to hold the same to the uses, upon the trusts, and for the purposes thereinafter mentioned—namely, to the use of the testator's nephew, Hugh Lowman Pester, and his assigns, during his life; with remainder to the trustees and their heirs during his life, in trust to support the contingent uses thereinafter limited; and from and after the death of Hugh Lowman Pester to the use of the first and other sons successively of Hugh Lowman Pester in tail male; and in default of such issue to the use of the first and other sons successively of the testator's niece Ellen Pester in tail male; and in default of such issue to the use of the first and other sons successively of the testator's niece Mary Pester in tail male; and in default of such issue to the use of the first son of the testator's niece Flora Pester in tail male; and in default of such issue to the use of the second, third, fourth, fifth, and all and every other the son and sons of Flora Pester successively in tail male; with remainders over, the ultimate remainder being to the use of the testator's own right heirs. The will contained a bequest of leasehold estate upon trusts similar, so far as the nature of the property and the rules of law and equity would permit, to the limitations of the real estate. The testator devised and bequeathed the residue of his real estate and all his personal estate to certain nieces, in equal shares as tenants in common.

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At the date of the will and at the time of the testator's death he had some land of his own in Axe, in Dorsetshire; he had no lands in either Crewkerne or Wayford, in Somersetshire, but, under a settlement made on the marriage of his late niece, Mrs. Richards, he was absolutely entitled to half of the proceeds of the sale of some lands in those parishes on the death of Mr. Richards, who was tenant for life under the settlement, such lands being subject to an absolute trust for sale. Mr. and Mrs. Richards had had no children. The testator's interest in these lands was, by reason of the trust for sale, a reversionary interest in personal estate. He was himself one of the trustees of the settlement. A Mrs. Coles was entitled to the other half of the proceeds of the sale. Some arrangement between her and the testator had been proposed by which, if it had been carried out, he would have acquired her interest in the proceeds of sale. But nothing came of this. Mr. Richards survived the testator, and died in 1874. The property was sold after the testator's death by the surviving trustees of the settlement, and the proceeds of sale were invested in Consols. The proceeds of sale had been divided in equal moieties between the respective legal personal representatives of Mrs. Coles and the testator. H. L. Pester died a bachelor in December, 1891. Mary Pester died a spinster in May, 1891. Ellen Pester was still living, but she was seventy years of age, and had not been married. Flora Pester married Mr. Devenish after the date of the will, but during the lifetime of the testator. She had a son born in his lifetime; but that son died soon after its birth and before the testator. She had other children, the eldest of whom was the plaintiff, a son, who was born on May 10, 1862. He claimed to be entitled under the will of the testator to his share of the proceeds of the sale of the lands in Crewkerne and Wayford.

Kekewich J. held that the testator's share of the proceeds of sale passed under the residuary bequest, and not to the plaintiff as devisee of the lands. The learned judge was of opinion that the language of the devise shewed that the testator intended to dispose of the estates not as money, but only as land, and that there was no gift of the money except in the residuary bequest.

The plaintiff appealed.

Upon the appeal the question was argued, at the suggestion of the Court, whether, treating the devise as a bequest of the testator's share of the proceeds of sale, the gift had not lapsed on the death of the first-born son of Mrs. Devenish in the lifetime of the testator.

Warmington, Q.C., and *Upjohn*, for the plaintiff. Assuming that the devise of the land operated to pass the testator's moiety of the proceeds of sale, the limitations in tail operate to give successive absolute interests in that moiety. That being so, there is no lapse by reason of the death of the first-born son of Mrs. Devenish in the lifetime of the testator, but the plaintiff takes under the gift. The gifts are alternative, and there is no repugnancy. The state of things at the date of the testator's death must be regarded, and the son who died before the testator is not to be reckoned at all. The plaintiff is really the first son of Mrs. Devenish for the purpose of this gift: *Lomax* v. *Holmden* (1); *King* v. *Bennett* (2); Fearne on Contingent Remainders, 10th ed. vol. i. p. 517; *Higgins* v. *Dowler* (3); *Phipps* v. *Lord Mulgrave* (4); *Brown* v. *Higgs* (5); *Boydell* v. *Golightly* (6); *Williams* v. *Lewis* (7); *Mackinnon* v. *Peach* (8); *Donn* v. *Penny* (9); *In re Stringer's Estate.* (10)

There is no doubt a dictum to the contrary of Knight Bruce V.-C. in *Harris* v. *Davis.* (11) He said (12) that "if a testator possessed of a specific personal chattel, such as plate, or a chattel real, liable to the same considerations, bequeath it to A. and the heirs of his body, and in default of such issue to B., the death of A. in the testator's lifetime, without issue, does not enable B., though surviving the testator, to take under the will, but causes a lapse." And the same view was taken by Lord Romilly M.R., in *Hughes* v. *Ellis* (13), which was followed by Jessel M.R. in *In re Stringer's Estate.* (10) But these cases are

(1) 1 Ves. Sen. 290.
(2) 4 M. & W. 36.
(3) 1 P. Wms. 98.
(4) 3 Ves. 613.
(5) 4 Ves. 708.
(6) 14 Sim. 327.
(7) 6 H. L. C. 1013.
(8) 2 Keen, 555.
(9) 1 Mer. 20, 22.
(10) 6 Ch. D. 1.
(11) 1 Coll. 416.
(12) Ibid. 424.
(13) 20 Beav. 193.

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opposed to the general course of authority, and they are not binding on this Court. Moreover, the dictum in *Harris* v. *Davis* (1) does not apply to a case like the present, in which at the date of the will there was no son of Flora Pester in existence. The testator could not have intended to give any particular person as the first son of Flora Pester, there being no son born when he made his will.

The same words may be construed differently as applying to real or to personal estate: *Forth* v. *Chapman.* (2) A gift by will to the children of A. is construed differently accordingly as there are or there are not children of A. living at the date of the will: *Hopkins* v. *Hopkins.* (3)

As to the other point, it is a question of construction. The testator clearly intended that his interest, whatever it was, in the lands to which he specially refers, should pass under the gift. A devise of land has often been held to pass the proceeds of the sale of the land: *Cooper* v. *Martin* (4); *Woodhouse* v. *Meredith* (5); *Adams* v. *Austen* (6). *Blake* v. *Blake* (7), *Gale* v. *Gale* (8), and *In re Clowes* (9) are distinguishable.

Fischer, Q.C., and *S. A. Sampson*, for residuary legatees. The land comprised in the settlement was converted into money as from the date of the settlement, and the testator, being one of the trustees of the settlement, must be taken to have known that. He had expected, by means of an arrangement with Mrs. Coles, to acquire her interest in the proceeds of sale, so that he would then have been in a position to take the whole as land. He intended to devise land, and not to bequeath money. He devised the settled land in conjunction with land of his own, and the words point to a strict settlement of real estate. The residuary gift clearly passes money. He made his will in anticipation of an event which did not happen; but this will not justify the Court in giving to the words a meaning which they will not fairly bear. There is no ambiguity. If the testator had not happened to be one of the trustees of the settlement,

(1) 1 Coll. 416.
(2) 1 P. Wms. 663.
(3) Cas. t. Tal. 44.
(4) L. R. 3 Ch. 47.
(5) 1 Mer. 450.
(6) 3 Russ. 461.
(7) 15 Ch. D. 481.
(8) 21 Beav. 349.
(9) [1893] 1 Ch. 214.

the trustees could have sold the land and conveyed it to the purchaser without the testator's knowledge. By holding that the devise did not pass the testator's interest in the proceeds of sale the devise will not be rendered ineffectual, for it will still operate to pass the testator's own land. The Court cannot add to or alter the words of the will: *Miller* v. *Travers.* (1) The Court cannot attribute to the testator an intention to do that which he probably would have done if he had known the effect of the words which he used: *Slingsby* v. *Grainger.* (2) The principle on which the plaintiff should act is illustrated by *Thompson* v. *Lady Lawley* (3); *Millar* v. *Woodside.* (4) In the cases in which it has been held that money passed under a gift of land the testator was entitled to the whole of the proceeds of the sale of the land, and not, as here, to only a share of the proceeds. Those decisions depended upon the fact that the testator had power to reconvert the money into land: *Holloway* v. *Radcliffe.* (5) In the present case the testator could not by any act of his own, independently of the owner of the other moiety, reconvert the money into land.

As to the other point, *Harris* v. *Davis* (6) is directly in point, and it has never been overruled. There cannot be valid limitations after a gift of an absolute interest in personalty: *Tothill* v. *Pitt.* (7) In *Lomax* v. *Holmden* (8) the limitations were of real estate. There is nothing here to shew that the testator intended only to give to a living person.

G. W. Melville Dale, for the personal representative of the testator.

Macnaghten, for another residuary legatee.

Upjohn, in reply. In *Tothill* v. *Pitt* (7) the legatee survived the testator. The question here is, whether the limitations were void before the death of the testator. *Holloway* v. *Radcliffe* (5) and *Thompson* v. *Lady Lawley* (3) do not apply to the present case.

Cur. adv. vult.

(1) 8 Bing. 244.
(2) 7 H. L. C. 273.
(3) 2 Bos. & P. 303.
(4) I. R. 6 Eq. 546.
(5) 23 Beav. 163.
(6) 1 Coll. 416.
(7) 1 Madd. 488; 7 Bro. P. C. 453.
(8) 1 Ves. Sen. 290.

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May 7. LINDLEY L.J. read a judgment in which, after stating the facts as above, he continued:—Kekewich J. has held that the residuary legatees, and not the devisee of the lands, are entitled to the testator's share of the moneys arising from their sale. This conclusion is based upon the ground that the language of the devise shews that the testator did not intend to dispose of the estates as money, but only as land, and that there is no gift of money except in the residuary bequest. I am unable to concur in this view. The unmistakable reference to the lands as those comprised in the settlement made on the marriage of his niece, Mrs. Richards, shews a clear intention to dispose of the property to which he was entitled under the trusts of that instrument, and, although he mistook the nature of his interest in that property, a gift of it as land, instead of as money arising from its sale, does not prevent his interest in it from passing to the person whom he clearly intended should take what he was himself entitled to under the settlement, to which he pointedly refers. What, after all, is a devise of land? It is only a devise of such estate or interest as the devisor has in the land, and primâ facie whatever estate or interest the testator has in land will pass under a devise of it by that name, if it is specifically referred to so as to shew that the testator had that particular land in his mind, and if there is nothing else to answer the description. Suppose in this case that there had been no residuary bequest, could it have been successfully maintained by the testator's next of kin that he had died intestate as regards his interest in the lands in question? Surely not. If, therefore, there was no other difficulty in the case, my opinion would be in favour of the appellant, the specific devisee of the land, and it would be sufficient to stop here.

But a much more difficult question remains to be considered. A bequest of personalty to a person in tail is a bequest to him absolutely; and a bequest to some one else, subject to the interest given to him, is repugnant and void if the legatee survives the testator; and it is contended that it is so even if he does not. Further, an absolute bequest to a person alive at the date of the will, but who dies in the testator's lifetime, lapses and falls into the residue. So does an absolute bequest to a person unborn at

the date of the will, and who is born afterwards, but who dies before the testator. So does a bequest to a person described but who is never born at all. Now, reading this will as applicable to money, the money is disposed of thus: It is given (1.) To Hugh Lowman Pester for life; (2.) To his first and other sons in tail male—that is, to his first son absolutely; and, as Hugh Lowman Pester died a bachelor, it is contended that this bequest lapsed and fell into the residue. The testator, however, proceeds to give the money—(3.) To the first and other sons in tail male of Ellen Pester, and there never has been, and there cannot now be, any such person; (4.) To the first and other sons in tail male of Mary Pester, to whom the same remark applies; (5.) To the first and other sons in tail male of Flora Pester, who has sons. It is not necessary to go further. When the testator died the person who, if there were no lapse or repugnancy affecting the earlier gifts, would take the money under this will is Flora's second son, the appellant, her first son having died in the testator's lifetime; and the question is whether, having regard to the terms of this will and to the doctrines of lapse and repugnancy, the appellant is entitled to the money. This question was not discussed before Kekewich J., but was elaborately argued before us. The authorities upon it are unfortunately conflicting.

In *Harris* v. *Davis* (1) Knight Bruce L.J., when Vice-Chancellor, referred to the very point, and his judgment is clearly adverse to the appellant. He said (2): "With reference to that case (i.e. *Mackinnon* v. *Peach* (3)), I may, perhaps, be allowed to say, that I have always thought, that if a testator possessed of a specific personal chattel, such as plate, or a chattel real, liable to the same considerations, bequeath it to A. and the heirs of his body, and in default of such issue to B., the death of A. in the testator's lifetime, without issue, does not enable B., though surviving the testator, to take under the will, but causes a lapse; nor am I the only judge of the Court of Chancery by whom that opinion is entertained. If *Mackinnon* v. *Peach* (3) is to be understood as shewing the Master of the Rolls not to be of that opinion, I must with great deference respectfully differ

(1) 1 Coll. 416. (2) 1 Coll. 424.

(3) 2 Keen, 555.

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from his Lordship. I apprehend that the bequest which I have just supposed excludes the notion that the testator meant B. or his representatives to take only if A. died without leaving issue, or to take only if neither A. nor issue of A. should be living at the testator's death, and excludes the notion, that anything but an interest in the chattel to commence after the failure of A.'s issue, whensoever happening, was meant to be given to B., or his representatives. The whole bequest supposed is, in truth, merely a gift to A. absolutely, a gift therefore wholly failing, as it seems to me, by A.'s death without issue in the testator's lifetime, or by A.'s death in the testator's lifetime. It surely could not be contended, that, in the event of the testator surviving A. and then dying survived by issue of A., it would be possible for B. to claim. I do not see that the absence of issue makes any difference. The gift to B. in the will being, as expressed, merely illegal or a mere nullity, cannot, I suppose, be made better by the accident of A.'s death without issue before the testator."

This view was also taken by Lord Romilly in *Hughes* v. *Ellis* (1) and *Greated* v. *Greated* (2), and by Sir George Jessel M.R. in *In re Stringer's Estate.* (3) But these cases were questioned by the Court of Appeal in that same case (4), although, owing to the construction put by the Court of Appeal on the will then before them, the point cannot be said to have been actually decided on that occasion.

The Vice-Chancellor Knight Bruce's decision in *Harris* v. *Davis* (5) is, however, opposed to that of Sir Richard Arden M.R. in *Brown* v. *Higgs.* (6) He held that a bequest of leaseholds to John Brown in tail, with remainder to such son of Samuel Brown as John should by deed or will appoint, was valid, John Brown having died in the testator's lifetime. The Master of the Rolls said (7): "It is clear, that if John Brown had survived the testator, in no case, that could happen, could this power have been exercised; for the limitation over of this leasehold property

(1) 20 Beav. 193.
(2) 26 Beav. 621.
(3) 6 Ch. D. 1.
(4) See 6 Ch. D. 14, 15.
(5) 1 Coll. 416.
(6) 4 Ves. 708.
(7) 4 Ves. 717.

in default of heirs male of his body would have been absolutely void: but in the event that has happened it is not void; all the limitations as to personal estate being clearly good, until one vests, carrying the whole interest."

Again, in *Donn* v. *Penny* (1) Sir William Grant expressed a clear opinion to the same effect. In that case a testator gave all his real and personal estate to Robert Donn and his male issue, and for want of such issue after him to William Donn and his male issue. Robert survived the testator and died without issue. It was held that he took an absolute interest in the testator's personal estate, and not an estate for life only. In his judgment (2) Sir William Grant, however, said: "If Robert had died in the life of the testator, there is no question but William would have taken the absolute interest." This obviously excludes a lapse of the bequest, and the application of the doctrine of repugnancy.

In *Mackinnon* v. *Peach* (3) Lord Langdale took the same view.

Lastly, in *Williams* v. *Lewis* (4) leaseholds were bequeathed to trustees in trust for A. for life, and after his decease for the heirs male of his body, and in default of such issue there were similar trusts for B. and the heirs male of his body, and for default of such issue to C. There was also a residuary gift. A. and B. both survived the testator and died without issue, and it was held that C. was entitled. It is obvious that if A. or B. had had a son, that son if he had survived the testator would have taken absolutely. This was decided by Kindersley V.-C. in the first instance (see *Lewis* v. *Hopkins* (5)), and yet he held, and both Lord Cranworth and the House of Lords, affirming his decision, also held, that, there being no such son, C. took, and not the residuary legatees. This decision is, in my opinion, in favour of the appellant in the present case, and against the residuary legatees.

The principle which I gather from these cases is, that where there are successive limitations of personal estate in favour of several persons absolutely, the first of them who survives the

(1) 1 Mer. 20.
(2) Ibid. 22.
(3) 2 Keen, 555.
(4) 6 H. L. C. 1013.
(5) 3 Drew. 668.

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testator takes absolutely, although he would take nothing if any other legatee had survived and taken; or, in other words, in the case supposed the effect of the failure of an earlier gift is to accelerate, and not to destroy, the later gift. This view seems more in accordance with the testator's intention than the view adopted by Knight Bruce V.-C. The doctrine of repugnancy has no application to gifts which fail; the doctrine does not come into operation until somebody takes, and it is only those limitations which defeat the interest some one takes that are void, on the ground that they are inconsistent with what is given to him. This is entirely in accordance with the opinion expressed by James L.J. in *In re Stringer's Estate* (1) already referred to, and is good sense. To extend the doctrine to limitations which never take effect is unnecessary for any useful purpose, and seems to me contrary to the weight of authority, and to defeat the intention of the testator. Whether, if land be devised to A. in fee, with remainder to B. in fee, B. can take if A. dies in the testator's lifetime, is a question which does not arise on the present occasion, and on which I say nothing. There may be authorities settling that question, although I am not aware of them. In the present case we are dealing with personal estate, and personal estate only. For the reasons I have given, I have come to the conclusion that the appellant is entitled to the fund in question, and that the decision appealed from ought to be reversed.

LOPES L.J. Two questions arise in this case. First, does the reversionary interest in the proceeds of sale, to which the testator was entitled, pass to the devisees under the limitations in respect of the lands of the testator in Crewkerne and Wayford, in Somersetshire; and secondly, if it does is the claimant (the second son of Flora) entitled to it?

The learned judge has held that nothing passes to these devisees, and that the proceeds of sale of the lands in question to which the testator was entitled fall into the residuary bequest. With the second question the learned judge has not dealt. I am unable to agree with the learned judge. The testator had either

(1) 6 Ch. D. 1.

forgotten, or did not know, that these lands, to a moiety of which he was entitled, were, owing to the absolute trust for sale, no longer real, but were to be regarded and were disposable as personal property. It is the duty of the Court, as far as practicable, to give effect to the intention of the testator, and, if possible, to give some meaning to every clause in the will. It is true that all the limitations are limitations applicable to real property; but at the same time the testator refers in distinct and unequivocal language to this property in Somersetshire. If the money, the proceeds of the sale of these lands, does not pass, nothing passes under these limitations, and they would be simply nugatory. Could the testator have intended this? It is clear to my mind that he did not. The gift of land is the gift of the rents and profits arising from it, and I cannot doubt for a moment but that he intended the proceeds of the sale of these lands to pass to those whom he intended to benefit by the limitation in question.

The property, however, must be regarded as personal property, and this gives rise to a serious difficulty. It is said that, so regarding it, the property vests absolutely in the first donee, and that a man cannot annex a course of devolution to a gift once given. This no doubt is true. A bequest of personalty to a person in tail is a gift to him absolutely, and a subsequent bequest of the same personalty to another person would be inoperative, if the first legatee survives the testator, and it is argued that the same result follows even if he does not so survive. I do not propose to read the limitations in question—they have already been read; suffice it to say, that when the testator died the person who would take, subject to the point raised, the previous limitation having failed, is the claimant, Flora's second son, the first son having died in the testator's lifetime.

The question is, those limitations having failed in the testator's lifetime, what is the position of a subsequent legatee who survived the testator? The authorities, which are conflicting, have been cited. The conclusion I draw from those cases is this, that the making of the will and the death of the testator only, not the intermediate time, is to be regarded in construing

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successive limitations in a will like this of personal property, and that all gifts which have become, during the life of the testator, impossible to take effect are to be disregarded, just as if they had never appeared in the will. This view is opposed to the dictum of Knight Bruce V.-C. in *Harris* v. *Davis*. (1) There are, however, authorities which it is difficult to reconcile with that dictum, and I venture, with all respect to the learned Vice-Chancellor, to prefer the view adopted in those authorities. In my judgment it is more consistent with good sound sense, and beyond all question more calculated to give effect to that which indisputably was the intention of the testator.

The result is that the applicant is entitled to the fund in question, and the appeal must be allowed, with costs out of the fund.

KAY L.J. The testator in this case was entitled at the date of his will and at his death to a reversionary interest in an undivided moiety of certain real estate which was subject to a trust for sale. That is, he was entitled to half the net proceeds of such sale, and he had not power, without the concurrence of the owner of the other moiety, to elect to take it as real estate. He, however, disposed of it by his will, together with certain other real estate of which he was in occupation, as though it had been real estate, describing it thus: "And also all the freehold messuages, lands, tenements, and hereditaments situate in the several parishes of Crewkerne and Wayford, in the county of Somerset, which I am seised or possessed of under or by virtue of the settlement made on the marriage of my late niece, Maria Fethers Richards with Edward England Richards (subject to the life interest of the said E. E. Richards)."

That was a full and accurate description of the lands in question, and could not apply to anything except property that he was entitled to under that settlement, which contained the trust for sale I have mentioned. Then he devised the property to two persons and their heirs to the use of his nephew Hugh for life without impeachment of waste, with remainder to trustees to preserve contingent remainders, with remainder to the first and

(1) 1 Coll. 416.

other sons of Hugh in tail male, with remainder to the first and other sons of the testator's niece Ellen in tail male, with remainder to the use of the first and other sons of his niece Mary in tail male, with remainder to the first and other sons of his niece Flora in tail male, with divers remainders over; all being limitations strictly applicable only to real estate. The will contained a bequest of leasehold estate upon trusts similar, so far as the rules of law or equity would permit, and a devise and bequest of the residue of his real and personal estate to his nieces, naming them.

The learned judge has held, looking to the nature of the testator's interest and to the limitations in his will, that he intended to pass real estate, and that his share of the proceeds of sale of this property did not pass. I confess, with deference, that I am unable to agree with that view. The intention to deal by this specific devise with the property to which the testator was entitled under the settlement in the parishes of Crewkerne and Wayford is indisputable; and it seems to me that it would be a flagrant disregard of that intention to hold that the trust for sale prevented the property such as it was from passing. The testator either forgot the trust for sale, or was not aware that the effect of it was to convert the property in equity into personal estate; but there is no authority or principle that I know of to prevent the Court from carrying out the expressed intention so far as the nature of the subject will permit.

But then arises a question of considerable difficulty. Hugh had no children, nor had Ellen or Mary. Flora had an eldest son, born after the date of the will, and who died without issue in the testator's lifetime, and a second son who survived the testator and now claims the property. A gift of personal estate by words which would create an estate tail in realty confers an absolute interest, and any gift over after that must necessarily be void. If any one of the previous limitations in tail had taken effect the gift to the second son of Flora in tail must have failed. But the question is whether, as none of those preceding limitations became effective, the Court should not, in favour of the testator's intention, regard the state of things existing at the testator's death, and thus treat the gift to the second son of Flora

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as though it were the first absolute interest in this personal estate given by the will.

There is one authority to the contrary in a dictum of Knight Bruce V.-C. in *Harris* v. *Davis*. (1) He says in effect that, if there be a gift of personal property to A. and the heirs of his body, remainder to B. and the heirs of his body, and A. dies without issue in the testator's lifetime, the gift to B. nevertheless fails. It was suggested in the argument before us that there was a difference where the first gift is not to a person living at the date of the will, but to a possible individual who may be born after that date, but who in fact never comes into existence, or who is born, but dies without issue in the testator's lifetime. But, in my opinion, there should be no difference between the cases. If the gift is void in one of them, it should be so in the others also. Because the reason seems to be, that, if you look at the will only, the gift over is void in its original limitation, and cannot be set up by events which happen, or do not happen, in the testator's lifetime. But is the doctrine that such a gift fails under the circumstances a sound one? In other cases the Court, in furtherance of the expressed intention, has regarded the state of things at the testator's death, when the will first became an effective instrument, as all important. For instance, where there was a devise of real estate before the Wills Act to the first son of A. and the heirs of his body, with remainder to the second son without words of limitation, and the first-born son of A. died in the testator's lifetime, the second son who was living at the testator's death was treated as the first son, and so took an estate tail: *Lomax* v. *Holmden*. (2) And this was followed in *King* v. *Bennett* (3), where a third son took as the second, he being the second son living at the death of the testator, and a similar construction was applied to limitations like those in the present case in *Williams* v. *Lewis* (4), and the doctrine is supported by some of the language of James L.J. in *In re Stringer's Estate*. (5) The decision in *Forth* v. *Chapman* (6), where the words "leave no issue" were construed to have a different meaning in the same

(1) 1 Coll. 416.
(2) 1 Ves. Sen. 290.
(3) 4 M. & W. 36.
(4) 6 H. L. C. 1013.
(5) 6 Ch. D. 1.
(6) 1 P. Wms. 663.

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sentence, as regards real and personal estate, does not extend to cases like the present. It is impossible to deny that the limitation to the second son of Flora was by way of remainder, that is, in the case of personal estate a limitation over, not by way of defeasance, but after the expiration of previous possible absolute interests. But then these absolute interests were not intended by the testator, but were created by a rule of law which prevents the previous limitations in tail from having their literal effect. In the events which have happened the testator has given the property to the second son of Flora in tail, which the Court construes as an absolute interest. But, although limited as a remainder after previous gifts in tail, it never could take effect as such a remainder, and it would best effectuate the intention to treat it as the first absolute gift, just as though the preceding gifts in tail, none of which became effective, had never in fact been made.

Upon the whole, I am of opinion that this mode of reading the will, so as to effectuate as far as possible the intention of the testator, is consistent with principle, and that there is some authority in favour of it; and, dissenting respectfully from the dictum in *Harris* v. *Davis* (1), I hold that the second son of Flora is, in the events which have happened, entitled to this property, as being the first absolute legatee thereof after the life interest of Hugh Lowman Pester.

W. L. C.

C. A.

May 20. The case was again brought before the Court on two questions arising out of the former decision: first, whether, assuming that the bequest of the moiety of the proceeds of the real estate in question did not lapse by reason of the death of the first son of Flora Devenish in the lifetime of the testator, the gift in remainder, on failure of his issue, to the second son in tail was not void as too remote; and, secondly, whether the plaintiff was entitled to the income of the estate since the death of the tenant for life in December, 1891.

Warmington, Q.C., and *Upjohn*, for the plaintiff. With respect to the first point, we contend that the gift over on failure of the

(1) 1 Coll. 416.

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issue of the first son was not too remote. It is true that the words if taken literally would import an executory gift over on a general failure of issue. But it could not have that meaning in this will. The testator used the words intending them to apply to real estate; and if the Court holds that this property is personal estate, the literal meaning cannot be given to those words. They must be construed as referring to failure of issue in the life of the parents. It was impossible that the property could vest, if it vested at all, in any one but a son of one of the persons named in the will, all of whom were alive at the time of the death of the testator. Therefore, the rule against perpetuities could not be infringed whatever event were to happen. Upon the death of the last person of those named in the will the property must have vested, if it vested at all. The gift is to read as an alternative gift, or a double contingency, neither alternative being beyond the rule against perpetuities: Lewis on Perpetuities, p. 176; Fearne's Contingent Remainders, 10th ed. vol. i. p. 515; Jarman on Wills, p. 1381; *Sabbarton* v. *Sabbarton* (1); *Stanley* v. *Leigh* (2); *Pelham* v. *Gregory* (3); *Lewis* v. *Hopkins* (4); *Williams* v. *Lewis* (5); *Jee* v. *Audley* (6); *Martelli* v. *Holloway* (7); *Marshall* v. *Holloway* (8); *Forth* v. *Chapman* (9); *Sheffield* v. *Lord Orrery.* (10)

With respect to the intermediate income during the life of Esther Pester, it is admitted that she is past the age of child-bearing; and in such cases the Court has been in the habit of treating the income as belonging to the person who will ultimately become entitled to it. In the present case the contingency has in effect happened upon which the property was to vest in the plaintiff, and the income since the death of the testator goes with the capital, the property having been set apart and separated from the testator's general estate: *In re Clements* (11); *In re Medlock* (12); *Burnaby* v. *Baillie.* (13)

(1) Cas. t. Tal. 55, 245.
(2) 2 P. Wms. 686.
(3) 3 Bro. P. C. 204.
(4) 3 Drew. 668.
(5) 6 H. L. C. 1013.
(6) 1 Cox, 324.
(7) L. R. 5 H. L. 532.
(8) 2 Swans. 432.
(9) 1 P. Wms. 663.
(10) 3 Atk. 282, 286.
(11) [1894] 1 Ch. 665.
(12) 55 L. J. (Ch.) 738.
(13) 42 Ch. D. 282.

Fischer, *Q.C.*, and *S. A. Sampson*, for the residuary legatees. There is nothing in the will to restrict the meaning of the words "in default of his issue," and as the gift is of personalty it imports an indefinite failure of issue. There is nothing that points to a particular time, as where the words are "without leaving issue." The gift over is, therefore, too remote: *Lord Dungannon* v. *Smith* (1); *Monypenny* v. *Dering*. (2)

With respect to the intermediate income, the event in which the estate is to vest is still in the eye of the law contingent. The income of a contingent legacy does not belong to persons who become ultimately entitled, but falls into the residue: *In re Dawson*. (3)

Upjohn, in reply.

Cur. adv. vult.

May 28. LINDLEY L.J. Since the former decision of this Court on the construction of the will of Hugh Perkins Lowman, further questions have arisen which it is necessary to consider. These are, first, whether the gift in favour of Flora Pester's second son is void on the ground that it infringes the rule as to perpetuities; and, secondly, whether, if it is valid, he is entitled to receive the income of the fund in question before Ellen Pester is dead.

It is well settled that, in considering whether a gift by will is or is not invalid on the ground that it infringes the rule against perpetuities, the Court must go back to the time of the death of the testator and consider the events which might then possibly happen, and the gift will fail if in any event which might then happen the subject of the gift might vest in some one who might not come into existence within a life then in being and twenty-one years afterwards. In this particular case the money in question could not possibly vest in any such person. It must have vested, if at all, in some child of Hugh Lowman Pester, or in some child of Ellen Pester, or in some child of Mary Pester, or in some child of Flora Pester. All these persons were living at the death of the testator, and they must have

(1) 12 Cl. & F. 546. (2) 2 D. M. & G. 145.
(3) 39 Ch. D. 155.

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had children, if at all, in their own lifetime. They could not have remoter issue without first having a child; and the moment any one of them had a child the fund vested in that child either absolutely or subject to be divested in favour of a child born afterwards, but entitled to take before it. But the important point is that no one could take before Flora Pester's child except a child of one of the other persons named; and any child who became entitled to the fund became entitled on birth, and not after the lapse of a time which might possibly be too remote. It is true that the gifts over are in default of issue, and that this expression might mean a general failure of issue; but when it is seen that the only issue who can possibly take is a child of a living person, and that such child must take, if at all, on birth, it appears to me impossible to say that the rule against perpetuities is infringed. I do not say that "issue" means "child," or that "in default of issue" means "in default of children"—but I do say that the only issue who can take is a child, and that consequently the legal effect of the expression "in default of such issue" is the same as if the expression had been "in default of such children"—in which case the rule against perpetuities would clearly not have been infringed.

I pass now to the second point. Ellen Pester is alive, but she is unmarried, and is seventy years old. At the death of the tenant for life she was over sixty-six. The question is, who is entitled to the income of the fund which is given in default of her issue to the child of Flora Pester? It has been decided that with reference to the rule against perpetuities the Court will regard any living person, however old, as capable of having children. (See *In re Dawson.* (1)) On the other hand, the Court is constantly in the habit of paying money out of court to persons contingently entitled to it in the event of a woman not having children, if she is well past the age of child-bearing. In such cases the Court acts on the common knowledge of mankind and on the presumption, amounting almost to a certainty, that she will not and in truth cannot have a child. In my opinion, the Court may properly act on that presumption in the present case, and authorize the trustee of the income of the fund in

(1) 39 Ch. D. 155.

question to pay such income and the accumulations thereof to the appellant.

One order had better be drawn up embodying the order made on the previous occasion and that now made, and the order may be dated to-day. The order as to costs will then stand.

LOPES L.J. Two questions have been raised in this case since our previous decision: (1.) Whether the gift to Flora's second son is bad for remoteness; and (2.) if it is not, whether that son is entitled to the income of the money during the life of Ellen Pester.

In applying the rule against perpetuities, the state of things existing at the testator's death is to be regarded, and possible, and not actual, events are to be considered; and therefore, if at the testator's death a gift might possibly not have vested within the proper time, it will not be good because as events subsequently occurred it did so vest.

When these rules are borne in mind, the present case is not difficult. The money could not possibly vest in any person who would not come into existence during a life then in being and twenty-one years afterwards. It must have vested, if at all, in some child of one of the nephew or nieces. The nephew and nieces were alive at the death of the testator, and if any of them had children those children must be born during their parents' lives and a period of gestation afterwards, if gestation existed. If any one took, the first person who took would take absolutely and would take within the prescribed limits. Directly Flora's second son was born during the life of the testator (the first having died in the testator's lifetime) he took a vested interest subject to the previous life estate, and subject to that interest being divested by the birth of any child entitled to take under the previous limitations. But there is no such child who could take under those limitations outside the prescribed limits, because any child who took would take a vested interest at his birth. The rule against perpetuities is not violated.

I agree with Lindley L.J. on the other point, and think in the circumstances of this case the income and accumulations may be paid to the appellant.

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KAY L.J. A claim was made after our former decision in this case on behalf of the residuary legatees to the income from the death of Hugh, the tenant for life during the rest of the life of Ellen; and on discussing that claim a suggestion was made that the limitation under which the Court had held that the second son of Flora was entitled was void for perpetuity. The case was restored to the paper for argument on this point.

The actual words of the limitation which we have to consider are these. [His Lordship read the devise in the will, and continued:—]

At the testator's death Hugh, Ellen, Mary, and Flora were all living, and there might be children born of any or all of them. In fact, there only existed at that time the present claimant, who was the second son of Flora. None of the others had then, or have since had, any issue. All are now dead except Ellen, who is long past the age of child-bearing. So that there cannot be any person to take an absolute interest before the second son of Flora.

The argument is that in order to determine whether a bequest infringes the rule against perpetuities the will must be alone regarded, and not events that happen after the testator's death; and as the gift to the second son of Flora is in terms limited after a general failure of issue male of Hugh, Mary, and Ellen, and of the issue male of Flora's first son, it is too remote. If, for example, any son had been born of Hugh, that son would have taken an absolute interest in this personal estate, and the limitation over by way of remainder must have been treated as a limitation by way of defeasance, and a defeasance on a general failure of issue would be void. It is argued, however, that the defeasance may be read as though it were alternative, i.e., upon the death of any of the stirpes without issue living at his or her death, or alternatively upon the general failure of his or her issue, and although the latter would be a void limitation over, the former, which has in effect taken place, is valid because it must happen within the compass of a life or lives which were in being not only at the death of the testator, but even at the date of his will, in which the names of Ellen, Mary, and Flora are all mentioned. Another argument is that the limitation which

has actually taken effect may be treated as though the intervening limitation to the children of Ellen and Mary and to the first son of Flora had not been made, as no such persons have ever been in existence at or since the testator's death. And as the children of any of them must have been born, if at all, within the compass of a life in being, in no possible event could the rule against perpetuities be infringed by holding that the first son in the series of limitations who might actually be born should take absolutely. A difficulty was suggested thus. Suppose at the death of Hugh, the tenant for life, it was possible that a son might be born of Ellen. Such child would be entitled to the exclusion of the son of Flora; and in that case the son of Flora could take nothing until it was seen whether a son of Ellen was born or not—in other words, until the death of Ellen, or at best Flora's son could only take an interest subject to be divested by the birth of such a son.

I think that in the events which existed at the death of the testator the second son of Flora took a vested interest subject to the life interest of Hugh, and subject also to be divested if any son should be born of Hugh, Ellen, or Mary; and that the gift over on failure of the issue of Flora's second son was void. There has not been, and now there cannot be, any son born to Mary or Ellen; and consequently the interest of Flora's son is no longer liable to be divested, but has become absolute.

This construction determines the question as to the intermediate income. On the death of Hugh, Flora's second son was entitled to receive it, and nothing can now occur to take it from him.

Solicitors: *Newman, Paynter & Co.; Lake & Lake; Bower, Cotton & Bower.*

W. M.

C. A.
1895
May 28.

In re HAMILTON.
TRENCH *v.* HAMILTON.

[1894 H. 317.]

Will—Precatory Trust—"I wish them to bequeath the same."

A testatrix gave legacies to her two nieces for their separate use, and added, "I wish them to bequeath the same equally between the families of O. and P." :—

Held (affirming the decision of Kekewich J.), that the legacies were given absolutely to the two nieces of the testatrix, and that there was no precatory trust for the families of O. and P.

In considering whether a precatory trust is attached to any legacy, the Court will be guided by the intention of the testator apparent in the will, and not by any particular words in which the wishes of the testator are expressed.

Malim v. *Keighley* (2 Ves. 333, 529 *a*) not followed.

In re Adams and Kensington Vestry (27 Ch. D. 394) and *In re Diggles* (39 Ch. D. 253) followed.

APPEAL from a judgment of Kekewich J. (1)

Susanna Hamilton, who died on May 3, 1857, by her will, dated January 5, 1856, made the following bequests: "I give bequeath and appoint to my dear nieces Mrs. Gascoigne and Lady Ashtown the sum of 2000*l.* apiece for their sole and separate use and to be independent of their husbands, and I wish them to bequeath the same equally between the families of my nephew Silver Oliver and my dear niece Mrs. Pakenham in such mode as they shall consider right."

Lady Ashtown received her legacy of 2000*l.*, and died in February, 1893, having made a will which in no way referred to the legacy. A summons was taken out by her executors to determine the question whether the legacy was bequeathed to Lady Ashtown absolutely or was subject to any and what trust in favour of the families of Silver Oliver and Mrs. Pakenham. Kekewich J. held that the legacy was bequeathed to Lady Ashtown absolutely; and the children of Silver Oliver and Mrs. Pakenham appealed.

(1) [1895] 1 Ch. 373.

Cozens-Hardy, Q.C., and *J. T. Prior*, for the appellants. There is no absolute gift to the two nieces of the testatrix. The gift is for their sole and separate use independently of their husbands, which is consistent with an interest for life only. The later cases have been more unfavourable to precatory trusts than the older ones, but they have not overthrown the general rule laid down by the old cases, that where the wish of the testator is decidedly expressed, and where the property is certain and the persons to whom it is to be given are certain, a trust will be implied: *Mason* v. *Limbury*, cited in *Vernon* v. *Vernon* (1); *Malim* v. *Keighley* (2); *Knight* v. *Boughton*. (3) The word "family" means "children," and there is an implied trust for them in default of appointment: *Pigg* v. *Clarke* (4); *In re Hutchinson and Tenant* (5); *Lambert* v. *Thwaites*. (6)

Warmington, Q.C., and *Cann*, for the executors of Lady Ashtown. The current of later authorities establish that the mere expression of a wish on the part of a testator is not sufficient to create a precatory trust: *Lambe* v. *Eames* (7); *In re Hutchinson and Tenant* (5); *In re Adams and Kensington Vestry* (8); *In re Diggles*. (9) In the present case there is no indication in the will of an intention to create a trust. The whole context shews an intention on the part of the testatrix to bequeath the money to her nieces as an absolute gift. The word "family" does not sufficiently define the persons among whom the money is to be appointed, or who are to take in case of default: *Harland* v. *Trigg*. (10)

B. B. Rogers, S. L. Bathurst, and *E. P. Hewitt*, for other parties.

Cozens-Hardy, Q.C., in reply.

LINDLEY L.J. In this case we have to construe a will which, apart from the cases, I should have thought plain. It is a short will, and it consists entirely of pecuniary legacies. There is not, in language, a trust from beginning to end of the will.

(1) Amb. 4.
(2) 2 Ves. 333, 529 *a*.
(3) 11 Cl. & F. 513.
(4) 3 Ch. D. 672.
(5) 8 Ch. D. 540.
(6) L. R. 2 Eq. 151.
(7) L. R. 6 Ch. 597.
(8) 27 Ch. D. 394.
(9) 39 Ch. D. 253.
(10) 1 Bro. C. C. 142.

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There is no bequest of any fund to any trustee: it is a mere string of pecuniary bequests.

The bequest with which we have to deal is this: [His Lordship read it, and continued:—] Lady Ashtown is dead. Silver Oliver has one child, and Mrs. Pakenham has also children, and the question is whether the child of Silver Oliver takes one half of the 2000*l.* which was bequeathed to Lady Ashtown.

Now, let us look at this language apart from all authority, and ask ourselves whether we can say, without stretching the language, that what this testatrix meant was that Lady Ashtown should have this 2000*l.* bequeathed to her for her life only, and that she should keep it subject to the duty of investing it, receiving the income for her life, and then that all she could do with it was to bequeath it between the families of Silver Oliver and Mrs. Pakenham in such a way as she should think fit. Is that the true reading of it? I confess, apart from authorities, I should have thought not. I should have thought that was the very last thing that was intended. I should have construed this will in this way: "I give this 2000*l.* to Lady Ashtown; but I express my wish that it should be employed in this particular way subject to any reason she may see to the contrary; I should wish her to leave it or bequeath it to these families"; but to impose on her a trust with the natural consequence of cutting down her interest to a tenancy for life, I should not be able myself to spell out of this language.

But then we are told that there are decisions which compel us to construe these words as giving her a life estate, and we are referred to a case of *Malim* v. *Keighley* (1), in which the then Master of the Rolls said this (2): "I will lay down the rule as broad as this; wherever any person gives property, and points out the object, the property, and the way in which it shall go, that does create a trust, unless he shews clearly, that his desire expressed is to be controlled by the party; and that he shall have an option to defeat it." Everything in that passage, to my mind, turns upon the emphasis which is to be attributed to this expression, "the way in which it shall go." If it means "the way in which it *shall* go"—imperatively—I do not quarrel with it. But contrast

(1) 2 Ves. 333, 529 *a*. (2) 2 Ves. 335.

that with what appears to me a far sounder principle of construction, which is to be found in the judgment of Cotton L.J. in the case of *In re Adams and Kensington Vestry*. (1) There the learned judge says (2): "I have no hesitation in saying myself, that I think some of the older authorities went a great deal too far in holding that some particular words appearing in a will were sufficient to create a trust. Undoubtedly confidence, if the rest of the context shews that a trust is intended, may make a trust, but what we have to look at is the whole of the will which we have to construe, and if the confidence is that she will do what is right as regards the disposal of the property, I cannot say that that is, on the true construction of the will, a trust imposed upon her. Having regard to the later decisions, we must not extend the old cases in any way, or rely upon the mere use of any particular words, but, considering all the words which are used, we have to see what is their true effect, and what was the intention of the testator as expressed in his will."

I say in this case that we are bound to see that the beneficiaries are not made trustees unless intended to be made so by their testator. The rule there laid down has been adhered to in *In re Diggles*. (3) It appears to me to be a far sounder principle of construction than the arbitrary rule laid down by the Master of the Rolls in *Malim* v. *Keighley*. (4) You must take the will which you have to construe and see what it means, and if you come to the conclusion that no trust was intended, you say so, although previous judges have said the contrary on some wills more or less similar to the one which you have to construe. I am prepared to act on that principle, and, acting on that principle, it appears to me that we should be straining these words to create a trust in obedience to decisions on former wills more or less different, and we should not be giving effect to the intention of the testatrix in this case.

I may also add that there is another indication of intention in this case which appears to me rather strong, and that is that the property is to be bequeathed to the families of the two persons named. The word "families" is a vague word; but it

(1) 27 Ch. D. 394.
(2) Ibid. 410.
(3) 39 Ch. D. 253.
(4) 2 Ves. 333, 529 *a*.

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indicates the wish of the testatrix that it should be distributed in some way among the people who might fairly be called the families of those two persons. Therefore, it is extremely difficult to imply in this case a gift in default. For these reasons, the appeal must be dismissed with costs.

LOPES L.J. The question we have to consider in this case is whether the words of the gift create a precatory trust in favour of the families of Silver Oliver and Mrs. Pakenham, and we are asked to come to the conclusion that what the testatrix intended was this, merely to give a life interest to Lady Ashtown with a power to appoint in favour of the families of Silver Oliver and Mrs. Pakenham, and we are asked to infer that that was her intention from the language she uses. If we were only to be guided by the earlier authorities, there would be strong ground for saying that this would be a precatory trust; but it seems to me perfectly clear that the current of decisions with regard to precatory trusts is now changed, and that the result of the change is this, that the Court will not allow a precatory trust to be raised unless on the consideration of all the words employed it comes to the conclusion that it was the intention of the testator to create a trust.

That being so, what we have to look at is the intention of the testatrix in this case; and I cannot for a moment infer the intention of the testatrix which has been suggested by the appellants. I will not refer to the case of *In re Adams and Kensington Vestry* (1), because my learned brother, Lindley L.J., has already referred to it. But there is this expression used in the case of *In re Diggles* (2), which appears to me to be applicable to the present case. It is there said by Fry L.J. (3): "The later cases have established the reasonable rule that the Court is to consider in each particular case what was the testator's intention." Now, construing this will which we have before us according to the ordinary use of the English language, I think that the testatrix did not mean to give an interest for life only to Lady Ashtown, with a power of appointment in favour of the

(1) 27 Ch. D. 394. (2) 39 Ch. D. 253.
(3) 39 Ch. D. 258.

other persons named, but that she intended to give her the 2000*l.* absolutely, trusting to her affection and honour to follow the wish, which is expressed, if she found it desirable so to do when the occasion required, but not intending in any way to fetter or bind her with regard to her disposition of the property. That being so, I think the learned judge's decision was right. I may remark that there is no trust in any other part of this will, and therefore it would be the more difficult to infer the particular precatory trust which it has been endeavoured to set up in this case.

KAY L.J. It is very important, no doubt, that the current of authorities, as it is called, should be as uniform as it can possibly be made, because unless it be so, it is extremely difficult for persons, without the assistance of the Court, to construe for themselves the words of any particular will. Therefore, when the current of authority lays down a particular canon of construction, I conceive the Court would be very reluctant indeed to depart from it. But what, on the other hand, seems to me to be of equal and even of greater importance is, that we should not by an arbitrary rule, which is supposed to have been laid down in cases more or less like one we have to determine, defeat the intention of the testator in the particular will which we have to construe.

Now, looking at this will by itself, quite apart from authority, I for myself have not the slightest hesitation or doubt as to what the proper construction of the will is, and I think that no one, whether a lawyer or a layman, would, looking at these words, hesitate at all as to what the testatrix really meant. [His Lordship then read the bequest, and continued:—]

I cannot find any indication whatever to lead me to any construction but this—that these legacies of 2000*l.* were given, in the first instance, to these ladies absolutely. All that is expressed here may be completely satisfied by supposing that they take absolutely these two legacies, and that the testatrix expressed a wish, which she did not mean to be at all binding, that when they made their own wills they should dispose of this 2000*l.* in a particular way, unless they saw reason to the contrary. That

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satisfies every one of the words. To my mind, that is the primâ facie clear meaning of the words.

Now we are asked to say that this is not the meaning of the words; that these ladies were not to take absolutely, but for life only, and that they were not to have power to bequeath it as if it was their own property, but that they had merely the power of appointment by will, and then that we ought to imply that which the testatrix has not said, that in default of appointment it is to go to those people who are indicated as objects of the power. It is quite impossible to arrive at that on the mere construction of these words. There is no trust expressed. There is no power of appointment. It is a wish that these ladies should bequeath that which was absolutely given to them. Unless it was absolutely given they could not bequeath it. There is no gift in default of appointment; and there is no gift in default of their making a will. There is nothing of that kind. All that has to be implied; and, therefore, it seems to me it would be extremely wrong to raise such an implication upon words like these.

But then it is said we are bound to put this construction upon the gifts because of the current of authority. To hold that I am bound to read this will in the way in which it is argued it should be read because of the current of authority, would be to tell me I am bound to defeat the intention of this particular testatrix because in somewhat similar cases the Court has come to a different conclusion. That is not the way to use authorities on the construction of a will; and where I find nothing in the will which will warrant me in coming to that conclusion, I decline to admit that there is any rule of construction which obliges me to treat a will in such a way as to defeat the intention of the testator. I do not think it necessary to go into a critical examination of any of the preceding cases. I think, without much exercise of ingenuity, one might distinguish every single case which has been cited from the particular case before us. I come to the conclusion upon this will that no precatory trust was intended; that upon this will it was intended by the testatrix to give an absolute interest in each of the legacies of 2000*l.*, and that the wish she has expressed was not

meant to be a binding wish so as to compel the legatees to do that which she says she wishes them to do. Accordingly, I think the decision of the learned judge in the Court below was right, and that this appeal fails.

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Appeal dismissed.

Solicitors: *Wilkinson & Son; Cope & Co.; Hopgoods & Dowson; Preston, Stow & Preston, for Rooke & Coker, Bath.*

M. W.

EBBETTS *v.* CONQUEST.

C. A. 1895 *June* 11, 12.

[1894 E. 433.]

Repair—Covenant to keep in Repair—Measure of Damages.

The measure of damages for breach of a covenant to keep demised property in repair is not the same in the case of an underlease as in that of a direct lease with a freehold reversion.

Where the underlessee has notice that there is a superior landlord, the immediate lessor's liability over to that landlord must be taken into account; and the cost of putting the property into repair at the end of the term may properly be considered for that purpose.

THIS was an appeal by the defendants from the report of an official referee finding them liable for 1305*l.* damages under a covenant to keep property in repair.

By indenture of lease dated May 8, 1840, certain hereditaments forming part of the estate of St. Botolph Without, Bishopsgate, were demised by the trustees of St. Botolph to Thomas Rouse for sixty-one years from Michaelmas Day, 1837. The lease contained a covenant by the lessee during the term to keep the premises in good and sufficient repair and condition, and a covenant to yield them up at the end of the term in good repair, reasonable use and wear and damage by fire excepted.

By underlease dated March 24, 1851, Rouse sub-let a part of the property to Benjamin Oliver for forty-seven and a half years from Lady Day, 1851, less ten days. The underlease contained covenants substantially identical with the covenants above referred to in the lease. This underlease shewed, on the face of

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it, that it was an underlease and not a lease by a freeholder, the rent being reserved to Rouse, his executors, administrators, and assigns, and there being several references to "the superior landlord."

The plaintiffs were trustees of the will of Rouse, and his interest in the premises comprised in the lease was vested in them.

On August 9, 1882, the premises comprised in the underlease were assigned to William Booth for the residue of the term thereby created, which would expire, it will be observed, ten days before Michaelmas, 1898.

Booth having failed to keep the premises in repair, the plaintiffs commenced this action in 1894 against Conquest (the executor of Oliver) and Booth, to recover damages under the covenant in the underlease to keep the premises in repair, and, so far as necessary, to have the estate of Oliver administered by the Court.

That there had been a breach of covenant was not denied; and by an order dated December 5, 1894, it was referred to the official referee to inquire and report what damages had accrued to the plaintiffs by reason of all breaches committed or allowed since August 10, 1882, of any of the covenants to repair contained in the underlease of March 24, 1851.

The defendants contended before the official referee, that when an action was brought during the continuance of a tenancy for breach of a covenant to keep the property in repair, the proper measure of damages was the extent of injury done to the marketable value of the reversion. Evidence was given to shew that at the end of the term the site would have to be cleared to be of any value, the only profitable way of dealing with it being to treat it as building ground, the buildings being worth nothing but to be pulled down. The evidence went to shew that if they were put into repair they would be worth 200*l.* more to pull down and carry away than if not put into repair. The defendants contended, therefore, that at most the value of the plaintiffs' reversion had only been diminished to the extent of 200*l.* by the want of repair. The official referee did not adopt this view, but held that as the plaintiffs, at the expiration of their term, would have to pay the full expense of putting the

buildings into repair, that expense must be taken into account in assessing the damage they had sustained. He considered that on the evidence the expense of putting the buildings into repair would be about 1500*l.*, and, allowing for the time to elapse before that sum would become payable, he assessed the damages at 1305*l.*

Haldane, Q.C., *Sargant*, and *H. Courthope-Munroe*, for the appellants. The question for decision is the measure of damages for the breach of the covenant on which the plaintiffs are suing. They are not suing on the covenant to deliver up the premises comprised in the lease in good repair, but on the covenant to keep them in repair during the term. It is well established that the measure of damages on such a covenant is not the expense of putting the premises into repair, but the present depreciation of the value of the reversion: *Vivian* v. *Champion* (1); *Smith* v. *Peat* (2); *Turner* v. *Lamb* (3); *Davies* v. *Underwood* (4); *Mills* v. *Guardians of East London Union* (5); *Joyner* v. *Weeks* (6); *Henderson* v. *Thorn* (7); *Whitham* v. *Kershaw* (8); *Wigsell* v. *School for Indigent Blind* (9); *Coward* v. *Gregory.* (10) The official referee admitted the principle of these cases, but considered that as the term was so near its close, and the reversioner was himself a tenant, the depreciation of the reversion must be measured by the expense of putting the premises into repair. But this is not the correct view. The depreciation of the reversion depends upon its selling value, and the surrounding circumstances must be taken into account. It is clear from the evidence that the lease could only be sold as a building site. No one would purchase the reversion for the purpose of keeping up the present theatre and tavern. He would pull down the buildings and erect new ones. If the buildings are pulled down, the only depreciation in the value of the reversion will be represented by the difference between old and new building materials.

R. F. Norton (*Jelf, Q.C.*, with him), for the plaintiffs. It is

(1) 2 Ld. Raym. 1125.
(2) 9 Ex. 161.
(3) 14 M. & W. 412.
(4) 2 H. & N. 570.
(5) L. R. 8 C. P. 79.
(6) [1891] 2 Q. B. 31.
(7) [1893] 2 Q. B. 164.
(8) 16 Q. B. D. 613.
(9) 8 Q. B. D. 357.
(10) L. R. 2 C. P. 153, 172.

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true that the plaintiffs are suing on the covenant to keep the buildings in repair, but they are themselves bound by their covenant with the superior landlord to deliver them up in good repair at the end of the term, and the injury to their reversion is measured by this liability. The plaintiffs could not sell their reversion now without giving an indemnity to the purchaser against the covenant with the superior landlord. Therefore, the injury to the reversion must be in some way measured by the cost of the repairs; and in what way this should be done ought to be left to the official referee. The evidence that the buildings are only fit to be taken away, and will be only worth 200*l.* more to be taken away if put into repair, is irrelevant to our case. We cannot take the buildings away nor utilize the site as a building site. It is shewn by *Davies* v. *Underwood* (1) that an intermediate landlord may recover substantial damages from his lessee for breach of a covenant to keep in repair, because he is liable to the superior landlord under the covenant to deliver them up in repair; and in *Clow* v. *Brogden* (2) Tindal C.J. says: "I see no reason why the plaintiffs should not recover in this action the sum of 29*l.*, the amount agreed upon as the damages for the dilapidations caused by the breach of the covenant to repair entered into by the defendants. The answer set up is, that the plaintiffs have sustained no actual damage, because (partly, at least, by the default of the defendants) the term in the premises has been determined. I think that it does not lie in the mouth of the defendants to make such an objection. But, independently of that, I am not convinced that the objection is reasonable; for the plaintiffs may be answerable over to the superior landlord, for the amount of these damages; and I see no ground why they should not recover them from the defendants." This case decides that if there is a liability over the plaintiff may recover damages in respect of it. The official referee has, we submit, gone upon a correct principle. The damages we sustain are, that when our term ends we shall have to pay the expense of putting the property into repair; and the official referee has allowed for the fact that this payment will only have to be made after a lapse of time.

(1) 2 H. & N. 570. (2) 2 Man. & G. 39, 54.

Haldane, Q.C., in reply. In Mayne on Damages, 5th ed. p. 99, the difference is pointed out between a covenant to do a particular thing and a covenant to indemnify the covenantee against the consequences of its not being done. Here there is no covenant to indemnify; so that only the natural consequences of the breach of the covenant to keep in repair are to be looked to, and they are the same whether the covenantee is a freeholder or a leaseholder. The depreciation in the value of the reversion is the only measure of damages when an action is brought pending the term. In *Whitham* v. *Kershaw* (1), in an action by landlord against tenant for waste, the diminution in value of the reversion was taken as the measure of damages.

LINDLEY L.J. This case has been fully argued, and we need not take further time to consider it. I think the official referee was right. The point is very important. The action is brought for breach of a covenant to keep property in repair, which is contained in an indenture of underlease of March 24, 1851, between Rouse, who was himself a tenant under the Bishop of London, and Mr. Oliver. The plaintiffs stand in the place of Rouse. Mr. Oliver is dead and his legal personal representative is Conquest, who has assigned to Booth. Now, the underlease itself shews plainly, and the underlessee must have known perfectly well, that his lessor was himself a lessee, and that he himself was taking an underlease; for not only is the rent reserved to the immediate lessor, his executors, administrators, and assigns—not his heirs and assigns—but we see in the underlease constant references to the superior landlord; for example, liberty is reserved to the agents of the superior landlord to come in and do repairs, and there is a covenant not to do anything which will annoy the immediate lessor's landlord or the tenants of the superior landlord.

The covenants which are contained in the underlease, and with which alone we have to deal, are covenants to repair, namely, covenants to put the demised premises into repair, to keep them in repair, and to deliver them up at the end of the term in good repair.

(1) 16 Q. B. D. 613.

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There is not in this underlease any covenant to indemnify the immediate lessor against his liability to his superior landlord in respect of repairs, and under these covenants the immediate lessor cannot get nearly so much in the shape of damages as he might if he were suing upon a covenant for indemnity—for instance, he could not recover the costs of proceedings brought against him by the superior landlord. The property demised by the underlease is out of repair. The plaintiffs are reversioners, having a reversion only of ten days; but they are liable on the expiration of their lease to deliver up this property to their landlord in proper repair. That is not disputed, and that circumstance is all-important in investigating what is the amount of damages to which they are entitled for breach of the covenant on which they sue. The underlease itself has not yet run out. When this action was commenced there were from four to four and a half years to run, and there are now about three and a half years. The action is not brought for a breach of the covenant to leave in repair, because the time for suing on that covenant has not arrived; it is brought for a breach of the covenant to keep in repair.

Now, what is the rule as to ascertaining the damages for a breach of such a covenant? The breach is not in controversy. It appears to me that this is an ordinary action for a breach of contract, and that the general principle applicable to it is that laid down in *Hadley* v. *Baxendale*. (1) Alderson B., in delivering the considered judgment of the Court, says: "We think the proper rule in such a case as the present is this:—Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus

(1) 9 Ex. 341, 354.

known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated." In applying that rule to this case, it is important to notice that the underlessee knew the position of his immediate lessor, for the underlease disclosed the fact that it was an underlease. It appears to me that, in ascertaining the damages which the plaintiffs have sustained by reason of the breach by the defendants of their contract, the plaintiffs' liability over to their lessor must be taken into account, for it was one of the circumstances, special if you like, but known to and reasonably within the contemplation of the underlessee. To put the matter in another form, there are certain rules for ascertaining damages on a breach of covenant, and in the case of a breach of covenant to repair there are certain subsidiary rules for ascertaining the amount of those damages. The cases establish that, in an action brought before the term has expired for a breach of covenant to keep in repair, you must look at the value of the plaintiff's reversion. Now, upon the principle of *Hadley* v. *Baxendale* (1), the damage for which the defendants are liable is the difference in value between the reversion with the covenant performed as it ought to be, and the value of that reversion with the covenant unperformed, which it ought not to be. The learned official referee has taken that view, and he has assessed the damages upon that principle. He says: "The principle I go upon is this: the term is very nearly at an end—it has got three and a half to four years to run. The value of this ten days of reversion if the property was in repair is so much, if the property is out of repair it is so much, and the difference is 1300*l.*" He gets at it in this way. He says: "It will cost 1500*l.* to put it in repair, and I will discount that and make it 1305*l.*" Mr. Haldane says that is wrong in principle, because that is really giving the plaintiffs an indemnity when there is no covenant for it. My answer to that is, it may be in this particular case an indemnity; but if the plaintiffs were suing upon a covenant of indemnity, they might get a great deal more.

(1) 9 Ex. 341.

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Mr. Haldane says you must treat this as an ordinary case of landlord and tenant where the landlord is the reversioner. If we were dealing with a reversion in the fee, I think that very likely 1305*l.* would not be the measure of damages; but you cannot leave out the cardinal point in this case, on which the whole case turns, namely, the tenant's liability over. It seems to me, therefore, that the principle which the learned referee has adopted is right, and the question whether his figures are right has not been brought before us. I think, therefore, that the appeal ought to be dismissed, and dismissed with costs.

LOPES L.J. I am of the same opinion. The general rule with regard to damages in actions of this kind may be stated thus: Where the term has come to an end and the action is on the covenant to leave in repair, the measure of damages is the sum it will take to put the premises into the state of repair in which the tenant ought to leave them according to his covenant, and the measure of damages for the breach of a covenant to keep in repair during the currency of the term is the loss which is occasioned to the lessor's reversion—a loss which will be greater or less according as the term of the tenant at the time of the breach has a less or greater time to run. Those, I think, are the general rules which are deducible from the cases; but there are special circumstances in this case which prevent this particular case coming exactly under either of these rules. In this case there is a liability over. The underlessee knew that he was taking from a lessee, and I cannot doubt that he knew of the covenants in his immediate lessor's lease, and amongst those covenants is a covenant to yield up in repair on the termination of the lease. To my mind, that is the most important matter in this case when we have to come to deal with the question of damages. We have under these circumstances to consider what is the loss to the lessor's reversion—in other words, what is the diminution of its marketable value. If he offered it for sale the purchaser would say, "If I buy I buy subject to a liability to yield up the premises in repair. I can only, therefore, give you such a sum as the premises are worth after deducting from that sum the cost of repairs."

In my view the plaintiffs are entitled to say, "We are liable to our lessor to give up these premises in repair. If you, the defendants, had observed your covenant and kept the premises in repair, our reversion would be worth so much; you have not kept it in repair, and it is worth so much less—that so much less being what it will cost to put it in repair. Therefore, the loss to our reversion is the cost of putting those premises in repair." Now, if I had to deal with this case with a jury, I should have left the question to them in the way I have already stated. I should say, "What you have to consider is what is the loss occasioned to the plaintiffs' reversion. In order to arrive at that you must in your own mind determine what is the value of this reversion with this covenant observed, and what is the value of this reversion with the covenant not observed; and the difference between those two sums will be the loss which the plaintiffs have sustained in respect of their reversion." I did not at first very clearly understand how the official referee had dealt with it; but it seems to me that that is the way in which he has dealt with it. He has taken all these matters into consideration, and he said that practically the loss that has accrued to the reversion is the difference between the value of the reversion with the covenant performed, and the value with the covenant unperformed. That amount, discounted as it ought to be, will, as he finds, amount to the sum of 1305*l*. We have not materials before us to enable us to say whether that is a proper figure or not; but I cannot say that the official referee is applying a wrong principle. I think, therefore, that the appeal fails.

RIGBY L.J. I am of the same opinion. We are not asked to decide whether the figures are right; the only question before us is as to the principle upon which they are arrived at. The authorities referred to by Mr. Haldane clearly shew that as a general rule there is a difference in the assessment of damages in an action for breach of a covenant to yield up in repair brought after the determination of the term, and in an action for breach of a covenant to keep in repair brought during the continuance of the term. In the first case, an arbitrary rule is laid down upon grounds of convenience, that whether or not the lessor

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in fact loses by the want of repair, he shall be paid the amount which would be necessary to place the premises in good repair. It may happen that a payment of that amount would not induce him to repair—it may be far more to his interest to let the building be pulled down; but these considerations are not taken into account, principally because they depend upon the arrangements which the lessor has made with other persons, with which the lessee has nothing at all to do, as to which in general he will have no information, and as to which at the time he enters into the bargain he can have none. In the second case the rule is that on a covenant to keep in repair you are to take the effect upon the value of the reversion, treating it as though it were carried into the market for sale under such circumstances that the purchaser might do whatever he liked with the property and turn it to the best advantage, which, I will assume in this case, would be by pulling down the building and treating the property as a mere building site. The very fact that the rule is stated in those terms appears to me to prevent the possibility of applying it to a case of this kind. This reversioner for ten days cannot take his reversion into the market and sell it to a purchaser who can deal with it as building ground; his interest is such that he cannot touch the buildings except for the purpose of repairing them; he cannot pull them down, and cannot convert the property into a building site; and, therefore, the supposed standard, which is a perfectly good standard of reason and good sense as well as of authority when applicable to the case of a freeholder who can deal with his reversion as he likes and give similar rights to the purchaser, ought not primâ facie to apply to a case of the present kind. Mr. Haldane was not able to point out an authority in which that principle had been so applied; and I think that in the absence of authority it ought to follow upon common-sense grounds from the very statement of the rule itself that it does not apply to the present case. What rule, then, ought to apply? We must consider the position of the parties. Mr. Oliver, through whom Mr. Booth claims, and by whose bargains he is bound, knew well that this property was not the freehold of Mr. Rouse, who demised to him. He had clear notice upon the face of his own underlease that it was an

underlease, and that there was a subsisting lease from the superior landlords, the trustees of St. Botolph, which is now vested in the plaintiffs; and knowing that, what is the clear rule of law? He must be taken to have known all the terms of that superior lease in the same way as if they had been recited at length in his own lease. It would appear that the original lessee was under liability himself to keep in repair, and a further liability at the end of the term under the covenant to yield up in repair. Now, applying the rule of *Hadley* v. *Baxendale* (1), what must be taken to have been in the contemplation of the parties? The fact, which was known to the underlessee, that his immediate lessor was under liability to yield up in repair, becomes one of the circumstances of the case to be looked at in the assessment of damages. The measure of damages is the loss to the plaintiffs arising directly out of the breach—a loss which must be known to be the necessary consequence of the breach under the circumstances of the plaintiffs' covenant with the superior landlord. I cannot find that the learned official referee has made such a mistake in principle that we ought either to reverse him or to send the case back to him. Mr. Rouse or his representatives will be worse off by reason of the non-performance of the covenant by about what it would cost at the end of the term to repair the premises and yield them up in good repair. That, of course, is not capable of being assessed with complete accuracy, but a good approximation can be made. The learned referee has taken evidence, and found that between 1500*l.* and 1600*l.* would be required for that purpose. He has taken from that a discount which reduces the whole sum to 1305*l.*; and the result is that he has awarded that sum as damages to the plaintiffs. I think he was right in so doing.

I will only observe that if the supposed general rule of the diminution of the reversion were to apply to a case of this kind, the result would seem to follow that in a case of ten days' reversion or three days' reversion nothing but nominal damages could be recovered during the term upon the covenant to keep in repair. I am of opinion that there has been no miscarriage, and that the appeal must be dismissed with costs.

(1) 9 Ex. 341.

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Mr. *Norton* asked that 1305*l.* which had been paid into Court should be paid out to the plaintiffs, with interest at 4*l.* per cent. Execution had been stayed when it was paid in.

THE COURT declined to give interest.

Solicitors: *Clarke & Calkin; T. Beard & Sons; Ranger, Burton & Frost.*

H. C. J.

C. A. 1895 *June* 12.

SHELFER *v.* CITY OF LONDON ELECTRIC LIGHTING COMPANY.

[1894 S. 840.]

MEUX'S BREWERY COMPANY *v.* THE SAME.

[1894 M. 610.]

Procedure—Suspension of Injunction—Appeal—Extension of Time—Court to which Application should be made.

A judgment directing an inquiry as to damages on account of a nuisance was varied by the Court of Appeal, who granted an injunction, but suspended its operation for a certain time:—

Held, that an application for its further suspension might be made to and disposed of by the judge to whose Court the action was attached.

THESE actions were tried before Kekewich J. in April, 1894 (1), when he refused to grant an injunction, but granted an inquiry as to damages occasioned by a nuisance. On December 18, 1894, his judgment was varied by the Court of Appeal, who granted the injunction, but suspended its operation until the first motion day in Easter Sittings, 1895. In April, 1895, the operation of the order was further suspended until June 12, 1895, upon the defendants undertaking to expedite the appeal which they had then presented to the House of Lords.

The defendants afterwards abandoned their appeal to the House of Lords, and were desirous of procuring a further suspension of the injunction in order to make alterations in their works so as to abate the nuisance complained of. This applica-

(1) [1895] 1 Ch. 287.

C. A. 1895

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tion was in the first instance made to Kekewich J.; but he doubted whether it would be right for him to suspend the operation of an order made by the Court of Appeal, and the application was accordingly now made to the Court of Appeal.

Moulton, Q.C., Renshaw, Q.C., and *W. C. Braithwaite*, for the defendants.

Warmington, Q.C., and *Waggett*, for the plaintiffs in the first action; and *Warmington, Q.C.*, and *Badcock*, for the plaintiffs in the second action.

THE COURT (Lindley, Lopes, and Rigby L.JJ.) heard the present application, and granted a further suspension of the injunction; but expressed the opinion that the application had rightly been made to Kekewich J., and might have been disposed of by him.

Solicitors: *Ashurst, Morris, Crisp & Co.; Parry & Gibson; Hunters & Haynes.*

H. C. J

CHASTEY *v.* ACKLAND.

C. A. 1895

May 16, 17; *June* 17.

[1894 C. 158.]

Air—Right to Access of Air—Stagnation of Air—Nuisance.

A right to have air come over a neighbour's land in a particular channel to a particular place may be established by immemorial user; but, in the absence of actual contract, no one can claim a right to have the general current of air over his neighbour's property to his property kept uninterrupted.

The plaintiffs' house was in a terrace fronting east. The defendant's house adjoined it and was the most northerly house in the terrace. On the north was an open square. Along the back of the terrace was a space twenty-eight feet wide, bounded on the west by a high wall, and divided into yards to the terrace houses. Opposite to the plaintiffs' house at the back was a urinal used by a great number of people, and the conveniences of the houses in the terrace were ventilated at the back. The defendant raised by sixteen feet a low building which formed the northern boundary of his yard. This erection to some extent darkened the plaintiffs' ancient lights and caused a stagnation of air in their yard, so that the exhalations from the urinal and conveniences were not carried off, and the plaintiffs' house became less healthy through want of ventilation. Cave J.

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considered that the interference with light was trifling and might be compensated by 10*l.* damages, but that the interference with ventilation was serious; and his Lordship granted an injunction against the continuance of the new building:—

Held, on appeal, that as the exhalations had not arisen from any act of the defendant, the stagnation in the plaintiffs' yard caused by the defendant's new building was not actionable either as an interference with a legal right or as a nuisance, and that the injunction must be discharged.

THIS was an appeal by the defendant from an order of Cave J. granting an injunction to restrain the defendant from maintaining certain new buildings above a certain height, on the ground that they obstructed light and the free passage of air.

The plaintiffs were owners and occupiers of a freehold messuage, No. 23, in a terrace at Exeter, called West Southernhay, which looked east. The defendant was the owner and occupier of the adjoining house, No. 24, which was the last house at the northern end of the terrace. Adjoining the northern end of the terrace was an open place called Bedford Circus. At the distance of about twenty-eight feet from the backs of the houses in the terrace was a wall about thirty-two feet high belonging to a drill-hall, which ran parallel to the terrace for about half its length. The space between the back of the terrace and the drill-hall was about nine feet lower than the street in front, and was divided into yards belonging to the houses in the terrace, in some of which yards there were low buildings. The northern boundary of the yard at the back of the defendant's house consisted of a low narrow building rising about thirteen feet above the level of the roadway in Bedford Circus. This, previous to the erection of the building complained of in the action, was the only structure on the defendant's land which lay to the back of his house. The plaintiffs' house, some time before they became occupiers, had been added to by the erection of a wing building projecting from the back of the house and coming to a distance of four feet from the drill-hall. Opposite to the plaintiffs' house was a urinal belonging to the drill-hall and used by a large number of persons. The conveniences of the houses in the terrace were ventilated from the back. All the houses were much more than twenty years old.

In 1894 the defendant raised the low building at the north of

his yard by about sixteen feet, extending all the way from his house to the drill-hall, and also erected in his yard a building which closed up the northern end of the passage four feet wide between the plaintiffs' wing building and the drill-hall. The effect of these alterations was to lessen materially the current of air flowing between the terrace and the drill-hall, and also to some extent to darken some of the back windows of the plaintiffs' house.

The plaintiffs brought their action for an injunction to restrain the defendant from erecting, or permitting to remain erected, any wall, building, or erection so as to darken the plaintiffs' ancient lights, or so as to obstruct the free passage of air to the back of the plaintiffs' premises.

The action was attached to the Court of North J., but was sent down for trial at the Exeter Assizes, and was tried by Cave J. without a jury. The plaintiffs, who were lodging-house keepers, deposed that the effect of the defendant's erections was to make the back rooms of their house close, and that they had suffered from loss of lodgers in consequence. They examined three medical witnesses, one of whom was the medical officer of the district. These witnesses all deposed to the air of the back rooms of the house, especially the back room on the first-floor, having been made close, stuffy, and unwholesome by the defendant's alterations, owing to there being no longer a current of air sufficient to carry off the exhalations of the urinal and of the conveniences to the houses. The medical officer said he could not say that the plaintiffs' premises were unsanitary, but that they were less healthy than before, and that now he should not think it advisable to send a convalescent patient to sleep in the first-floor back room, though the air of the house had previously been very fresh. Judge Edge, who had been in the habit of occupying the first-floor for four or five days at a time eleven times in the year when his circuit took him to Exeter, gave evidence. When he saw the alterations in progress he expressed a doubt whether he should choose to occupy the bed-room after they were completed. After their completion he slept in the bed-room and several times awoke with a headache, and he complained of the air being impure when he opened the window.

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The defendant's medical witnesses disputed the fact of the air being less pure than before, and asserted that a current of air going over the defendant's erections would suck up the air below so that there would be no perceptible difference in the ventilation.

Cave J. inspected the premises, and came to the conclusion that, as regarded the obstruction of light, there was no case for an injunction, and that 10*l.* damages would be a sufficient compensation. His Lordship, however, considered that the pollution of air caused by the obstruction of the current was serious, and granted a mandatory injunction. Against that injunction the defendant appealed.

Cozens-Hardy, Q.C., and *J. A. Foote*, for the appellant. The judgment proceeds upon the assumption that the plaintiffs had a prescriptive right to the free passage of air over the defendant's tenement to theirs. But no man has a prescriptive right to the air passing over his neighbour's land. No man may pollute the air which goes to his neighbour's house; but if he merely obstructs the air his neighbour has no remedy unless the obstruction amounts to an actual nuisance: *Bryant* v. *Lefever* (1); *Dent* v. *Auction Mart Co.* (2); *City of London Brewery Co.* v. *Tennant* (3); *Harris* v. *De Pinna.* (4) There is here no pollution caused by the defendant's erection: all that it does is to check the current of air over the back-yards. There is a broad distinction between the right to an easement and the right to complain of a nuisance: the former would give a right to complain of things which could not be attacked as nuisances. There is in the present case no easement, for the Prescription Act does not apply, nor can a lost grant be presumed, as there is no defined channel. Assuming against ourselves that if what we did was injurious to health, the plaintiffs would be entitled to an injunction, we say there is no evidence that what we have done is injurious to health. The medical officer only says that the plaintiffs' premises are made less healthy; he does not say they are insanitary, and says he should not condemn them as such.

(1) 4 C. P. D. 172.
(2) L. R. 2 Eq. 238.
(3) L. R. 9 Ch. 212, 221.
(4) 33 Ch. D. 238.

If there are foul smells in a place, the person who complains of them should take steps against the persons who cause them instead of bringing an action to abate a building which has the effect of confining them. The only other scrap of evidence as to the building being injurious to health is that of Judge Edge, who had given an opinion before the building was erected, and does not bring an unbiassed mind to the question.

[KAY L.J. Suppose a man has a convenience on his land and you build up to it so as to make it insanitary from want of air.]

There would be no actionable wrong. That a man sets up a convenience on his land cannot diminish his neighbour's right of building. The judge was prejudiced against our case by some of our medical witnesses pooh-poohing Judge Edge's headaches; and by their dwelling on the theory that the currents above would suck up the air from below, so that a lateral obstruction would not make the air impure. The judge thought this absurd, and it prejudiced him against our case. Even if the low building should be condemned as blocking the current through a defined passage four feet wide, the building at the end cannot be objected to, for it only interferes with the general sweep of air not flowing in any definite channel.

[LINDLEY L.J. There is a ground of action because that building obstructs the light; it therefore is not legally where it is. That being so, may it not be a question whether any other damage it does, though not by itself actionable, may not be taken into account?]

Warmington, Q.C., H. E. Duke, and *H. Broughton Edge,* for the plaintiffs. The effect of the decision of a judge trying a case without a jury is dealt with in *Imperial Gaslight and Coke Co.* v. *Broadbent.* (1) His findings of fact are equivalent to the verdict of a jury. Here the judge has found as a fact that the plaintiffs' property was in a very good sanitary condition before the defendant's erections, and that the defendant had made it less wholesome. This is actionable as a nuisance. The law on this subject is founded on *Aldred's Case* (2), where it is laid down that, "It may be that before time of memory the owner of the

(1) 7 H. L. C. 600, 607. (2) 9 Rep. 58 b.

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said piece of land has granted to the owner of the said house to have the said windows, without any stopping of them, and so the prescription may have a lawful beginning: and Wray C.J. then said, that for stopping as well of the wholesome air as of light, an action lies, and damages shall be recovered for them." None of the authorities cited against us apply to a case where the air has been rendered unwholesome. The unwholesome diminution of air is treated as actionable by Blackburn J. in *Webb* v. *Bird* (1), and in *Bryant* v. *Lefever* (2) and *City of London Brewery Co.* v. *Tennant.* (3) We have by prescription a right of access of air to definite apertures, namely, the windows: *Gale* v. *Abbot* (4); *Hall* v. *Lichfield Brewery Co.* (5) We are entitled to prescription by implied grant, for access of wholesome air to our windows has been enjoyed for more than twenty years. If the smell only arose from what was on our own premises we could not complain. The effect of what the defendant has done is to render the ventilation of the plaintiffs' house through the windows so incomplete that the house is made unwholesome.

[LINDLEY L.J. referred to *Bass* v. *Gregory.* (6)]

That case shews that there may be a right by prescription or lost grant to ventilate through a defined shaft. The subject is discussed in *Aldin* v. *Latimer Clark, Muirhead & Co.* (7), though the actual decision does not bear on the case. *Shelfer* v. *City of London Electric Lighting Co.* (8) justifies an injunction, and shews that damages would not be the proper remedy.

Cozens-Hardy, Q.C., in reply. If the respondents succeed on this appeal it will be easier to get relief for stoppage of air than for stoppage of light—the windows actually do not look towards the building complained of. The plaintiffs' case is opposed to the view of Wood V.-C. in *Dent* v. *Auction Mart Co.* (9), and to that of Lord Selborne in *City of London Brewery Co.* v. *Tennant.* (3) The doctrine of implied grant arises from the grantor allowing something to be done which he cannot prevent, and in order to apply it to air you must have a defined aperture opening upon

(1) 13 C. B. (N.S.) 841, 844.
(2) 4 C. P. D. 172, 178.
(3) L. R. 9 Ch. 212, 221.
(4) 8 Jur. (N.S.) 987.
(5) 49 L. J. (Ch.) 655.
(6) 25 Q. B. D. 481.
(7) [1894] 2 Ch. 437, 445.
(8) [1895] 1 Ch. 287, 316.
(9) L. R. 2 Eq. 238.

the defendant's land. This condition was satisfied in *Bass* v. *Gregory*. (1) In *Hall* v. *Lichfield Brewery Co.* (2) there were two apertures in a slaughter-house which opened towards the defendants' land, and were manifestly and notoriously intended and used for the purpose of ventilation. Moreover, *Bryant* v. *Lefever* (3) was not cited in that case. There cannot be prescription under the statute 2 & 3 Wm. 4, c. 71. The only sections giving rights are the 2nd and 3rd. The 3rd only applies to light, and it has been decided in *Webb* v. *Bird* (4) that s. 2 does not apply to access of air. But the plaintiffs do not rest their case on our preventing the access of air, but on our having altered the quality of the air. That we have not done. Whatever nuisance there may be does not come from the defendant's building, and the plaintiffs have no right to call upon him to leave a current of air sufficient to carry all impurities away.

Cur. adv. vult.

June 17. LOPES L.J. This case was heard by Cave J. at Exeter, and resulted in a judgment for the plaintiffs for an injunction restraining the defendant from maintaining certain new buildings beyond a certain height, on the ground that they obstructed the light to which the plaintiffs were entitled in respect of certain ancient lights, and also on the ground that they obstructed the free passage of air over and above the plaintiffs' premises, and thereby created a nuisance to them in their occupation of their said premises.

The learned judge held that, so far as the obstruction to light was complained of, judgment for 10*l.* with costs would satisfy the plaintiffs' claim. Against this determination of the learned judge there is no appeal.

The appeal is against the injunction which has been granted in respect of the alleged nuisance.

The evidence leads me to the conclusion that there is a want of ventilation and an absence of the means of carrying off bad smells on the plaintiffs' premises, and that probably the

(1) 25 Q. B. D. 481.
(2) 49 L. J. (Ch.) 655.
(3) 4 C. P. D. 172.
(4) 10 C. B. (N.S.) 268; 13 C. B. (N.S.) 841.

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interruption to the free passage of air over the plaintiffs' premises caused by the defendant's new wall has aggravated the mischief which had previously existed. But nothing deleterious, nothing hurtful, nothing disagreeable, is brought on the plaintiffs' premises by anything which the defendant has done. The bad smell and the stuffiness which interferes with their comfort arises on the plaintiffs' premises. Unless the plaintiffs have against the defendant a right to get rid of this in the particular way which has been interfered with by the defendant, they cannot sue the defendant for a nuisance because the smell and stuffiness, arising on the plaintiffs' own premises, for which they have not provided any effectual means of escape, causes him annoyance. Every man has a natural right to enjoy the air pure and free from noxious smells or vapours, and any one who sends on his neighbour's land that which makes the air impure is guilty of a nuisance; but a man must not impose an obligation on his neighbour by having a want of proper ventilation on his own premises. If any nuisance existed, it was not a nuisance created by the defendant, and I am unable to agree with the learned judge in the Court below in thinking that the plaintiffs have any cause of action against the defendant on the ground of nuisance. The case of *Bryant* v. *Lefever* (1) is directly in point, and the reasoning in that case applies here.

But it is contended on behalf of the plaintiffs that, independently of nuisance, they have a right to the free passage of air over and above their premises—a right to have any disagreeable smell existing on their premises carried away by the current of air which would pass over their premises—which right the defendant, by his new buildings, has infringed. It becomes necessary to consider what legal right with regard to the free passage of air the plaintiffs have against the defendant—what unlawful act the defendant has done which entitles the plaintiffs to complain. By raising his buildings on his own land (which he had a perfect right to do) he has to some extent intercepted the free passage of air above and around the premises of the plaintiffs. The current of air comes from the defendant's premises laterally to the plaintiffs' premises, but through no defined

(1) 4 C. P. D. 172.

aperture or passage. The air is at large, and in no way confined within finite limits. The claim of the plaintiffs is not to have the air pass through some definite channel constructed for the purpose of containing and communicating it, but it is to have the current of air float over the whole of the plaintiffs' property—over the yard and the rest of their property at the back of the house. Such a right cannot be maintained. The plaintiffs cannot, in support of the alleged right, rely on prescription at common law, because the houses have been built within legal memory; nor on prescription by statute, because the right to the passage of air is not a right to an easement within the meaning of 2 & 3 Wm. 4, c. 71, s. 2; nor on the presumption of a lost grant from long-continued enjoyment, because such a presumption only arises where the person against whom the grant is claimed might have prevented or interrupted the exercise of the subject of the supposed grant. Such prevention or interruption is practically impossible here. Bowen L.J., in *Harris* v. *De Pinna* (1), says: "Then we come to the air. It seems to me that the only claim for air which could be supported here is a claim to the passage of undefined air over the premises of the defendant until it reaches the plaintiffs' property. It would be just like amenity of prospect, a subject-matter which is incapable of definition. So the passage of undefined air gives rise to no rights and can give rise to no rights for the best of all reasons, the reason of common sense, because you cannot acquire any rights against others by a user which they cannot interrupt."

But it was urged that the right to the access of air had been acquired by an implied covenant—an implied covenant entered into at the time the houses were built—that the owners of the adjoining houses would not do anything to intercept the free passage of air over their neighbours' property. The answer is, that there is nothing from which such a covenant can be implied. *Hall* v. *Lichfield Brewery Co.* (2) was a case where the plaintiff had for upwards of thirty years enjoyed a free access of air to his slaughter-house through two defined apertures, and there were circumstances in the case raising the presumption of an implied covenant. It was a user, too, which might have been

(1) 33 Ch. D. 262. (2) 49 L. J. (Ch.) 655.

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interrupted. The law will not imply a grant except it is of something definite. The undefined passage of air is too vague. If the plaintiffs have been inconvenienced by anything the defendant has done, it is damnum absque injuriâ, and affords no legal ground of complaint to the plaintiffs. The appeal must be allowed.

KAY L.J. (after shortly stating the facts). There was a conflict in the sworn evidence as to the effect of the buildings upon the plaintiffs' house. The learned judge seems to have agreed with those witnesses who said that the air in the plaintiffs' yard had become more stagnant, that the basement of their house has become damp, and the air in the rooms stuffy and unwholesome.

Lord Cranworth, in *Durell* v. *Pritchard* (1), said that the Court will not interfere by way of mandatory injunction except in cases in which extreme, or, at all events, very serious, damage will ensue from its interference being withheld. Applying this rule, the learned judge seems to have thought that the damage done by interference with light would not alone have justified the granting of a mandatory injunction. The question is, whether the interruption of the current of air past the back windows of the plaintiffs' house, in addition to the interference with the light, warranted the Court in granting it. It is denied in argument that such an interruption of air constitutes a legal wrong. It is pointed out that there is no diminution of the quantity of air that would enter any window of the plaintiffs' house. The defendant has not built anything opposite to any of those windows. All he has done is to prevent some of the current of air which, before his buildings were erected, would pass through the series of back yards including the plaintiffs' yard, past the plaintiffs' windows, and thus the air which enters the plaintiffs' house by those windows is rendered less fresh and salubrious. The case is different from the act of a man who fouls the air on his own land, as by brick-burning, and allows such foul air to pass on to his neighbour's land. The defendant here has not fouled the air. By diminishing the current over the plaintiffs' yard he has rendered the air in that yard more stagnant, so

(1) L. R. 1 Ch. 244, 250.

that, if any foul exhalation mingles with it, such exhalation does not pass away so speedily as it would before. In *Webb* v. *Bird* (1) very eminent judges agreed in deciding that building upon a man's own land so as to diminish or interfere with the air which came to the plaintiff's windmill was not a legal wrong, although the windmill had existed more than twenty years. They held that the right to the passage of the air was not an easement within 2 & 3 Wm. 4, c. 71, s. 2, and that no presumption of a grant of such a right could be made, because it would have been difficult, if not impossible, for the owners of the adjoining land to interrupt it so as to prevent the acquisition of it by lapse of time. Lord Blackburn, in his judgment, guards himself against saying anything which would affect the common law right which may be acquired to the access of light and air through a window.

This was followed in *Bryant* v. *Lefever* (2), where the plaintiff complained that the defendants had raised their house, which adjoined the plaintiff's house, so as to make the plaintiff's chimneys smoke. The jury found that this sensibly and materially interfered with the comfort of human existence in the plaintiff's premises. It is obvious that this was a mere interference with the direction of the current of air. Coming over the higher building, it would fall upon the top of the plaintiff's chimneys and so check the upward draught. The alleged case of nuisance was answered by the learned judges by saying the nuisance was occasioned by the smoke generated in the plaintiff's own house, and was not caused by the defendants. But Bramwell L.J. says that if the defendants did cause the nuisance, they had a right to do so. The decision had nothing to do with the question whether a man can stop or materially diminish the air coming over his land to a defined orifice for the admission of air, such as a window which has existed more than twenty years in his neighbour's house.

In *Harris* v. *De Pinna* (3) the plaintiff had a structure for storing timber, open at the sides abutting on the defendant's premises, and it was held that he could not maintain a claim

(1) 10 C. B. (N.S.) 268; 13 C. B. (N.S.) 841.

(2) 4 C. P. D. 172.

(3) 33 Ch. D. 238.

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of right to have all the air which came across the defendant's premises to this structure.

On the other hand, there is authority for the proposition that the diminution of the quantity of air entering a house by a defined aperture which has existed for the admission of air for more than twenty years may be a legal wrong. In *Aldred's Case* (1) Wray C.J. said that "for stopping as well of the wholesome air as of light, an action lies, and damages shall be recovered for them, for both are necessary, for it is said, et vescitur aurâ æthereâ . . . but for prospect, which is a matter only of delight, and not of necessity, no action lies for stopping thereof . . . and if the stopping of the wholesome air gives cause of action, a fortiori an action lies . . . for infecting and corrupting the air."

In *Gale* v. *Abbot* (2) stopping the air from coming to the plaintiff's house by the ancient window of his back-kitchen was held to be a nuisance, and an injunction was granted to prevent the continuance of the obstruction.

In *City of London Brewery Co.* v. *Tennant* (3) Lord Selborne said: "It is only in very rare and special cases involving danger to health, or at least something very nearly approaching it, that the Court would be justified in interfering on the ground of diminution of air."

In *Hall* v. *Lichfield Brewery Co.* (4) Fry L.J., when a judge of first instance, decided that the interruption of the free access of air through two apertures to a slaughter-house, which had existed for thirty years, was an actionable wrong, and he gave damages. In his judgment the learned judge said that the right to have an access of air to an aperture in a dwelling-house undoubtedly exists at law; that it could not be claimed by grant, because it was not a thing which was to be used by the grantee on the soil of the grantor, therefore it was not a subject of prescription which is the implication of a grant; but it was put by Littledale J., in *Moore* v. *Rawson* (5) upon a covenant which the law would imply, and the nature and extent of such implied covenant in the case of a dwelling-house would be, in Sir

(1) 9 Rep. 58 b.
(2) 8 Jur. (N.S.) 987.
(3) L. R. 9 Ch. 221.
(4) 49 L. J. (Ch.) 655.
(5) 3 B. & C. 332.

Edward Fry's words, "not to interrupt the free use of salubrious air. Anything, therefore, which renders the air unsuitable either in point of quantity or quality for the purpose of a dwelling-house, or the human beings who occupy it, would be a breach of the implied covenant." From another report of the same case (1) it appears that the defendant's building complained of was so near to the slaughter-house of the plaintiff that it materially diminished the draught of air through the apertures in question.

In *Bass* v. *Gregory* (2) the plaintiff had for forty years enjoyed the passage of air from a cellar in his house through a tunnel which opened into a wall on his neighbour's land, and it was held that the neighbour could not stop up the wall so as to prevent the passage of air by this tunnel.

Now, the question is, within which of these two classes the present case comes. It was put in argument as an interference with the air coming to the plaintiffs' windows. I have pointed out that the acts of the defendant have not diminished the quantity of air entering those windows, nor have they altered the quality of the air which passes from the defendant's land. The consequence of the air in the plaintiffs' back yard becoming more stagnant seems to me to be too remote to make what the defendant has done a legal wrong.

But the learned judge seems to have found that the defendant's acts have occasioned a nuisance to the plaintiffs. So far as such nuisance results from emanations from the urinals and other conveniences in any of the back yards, the reasoning of the judges in *Bryant* v. *Lefever* (3) seems to apply. These are not caused by the defendant, and the remedy, if any, should be sought against the owners of the several erections which emit noxious odours. But can an interference with light or air which is not otherwise actionable be restrained on the ground of nuisance? Bramwell L.J., as I have pointed out, says it cannot. Suppose a man were to build a house on the edge of his own land, with windows for the admission of light and air looking over his neighbour's land. Nothing could be a greater nuisance than completely to block such windows by

(1) 43 L. T. (N.S.) 380. (2) 25 Q. B. D. 481.
(3) 4 C. P. D. 172.

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building a wall immediately opposite to them. But it cannot be doubted that the neighbour might do this at any time within twenty years. It is quite right to say, as Lord Selborne intimated in the words I have quoted, that a diminution of the quantity of air coming to a defined aperture in a house which has existed for twenty years so considerable as to cause a nuisance may be actionable. But that is the only way in which the term can properly be applied to a mere diminution in the quantity of the air. Unless the right to have it come over the land of another has been acquired by lapse of time, the mere diminution of quantity is not a nuisance in law. The result is that the interference with the current of air in this case was not such as to cause an actionable wrong, and the injunction must be dissolved. The judgment should be for 10*l.* damages and costs of the action, save so far as increased by the claim as to air, and the defendant must have the costs of the appeal.

LINDLEY L.J. I concur in the judgments which have been read; but I will add a few words to explain the view I take of the case, which I regard as an extremely important one.

It has been decided that the right to air is not an easement within s. 2 of the Prescription Act (*Webb* v. *Bird* (1)). Independently of the Act, every one has a right to enjoy whatever air comes to him; but speaking generally, apart from long enjoyment, or some grant or agreement, no one has a right to prevent his neighbour from building on his own land, although the consequence may be to diminish or alter the flow of air over it on to land adjoining. So to diminish a flow of air is not actionable as a nuisance. But although the Prescription Act does not apply to air, a right to have it come over another's land, in some definite direction to some particular place, can, I apprehend, be established by what is called immemorial user, or by user which may have had for its origin some lost grant or agreement binding on the owners of the servient tenement.

In the present case immemorial enjoyment is not alleged, no doubt because the plaintiffs' house is not sufficiently old.

Then, as to a lost grant or binding agreement to allow air to

(1) 13 C. B. (N.S.) 841.

come freely to the back of the plaintiffs' house over the defendant's land. The plaintiffs do not prove enjoyment of air coming in any definite direction over the servient tenement, and to burden the servient tenement to the extent necessary to protect the plaintiffs from a diminution of the free passage of air to the yard at the back of their house is, I think, contrary to the authorities, and would be to stretch the doctrine of lost grant further than principle warrants. The subject-matter of the grant is too indefinite. The doctrine, if applicable to one neighbour, would be equally applicable to all, both for better and for worse; and there are no grounds for benefiting or burdening all or any of them to the extent necessary to protect the plaintiffs in the enjoyment of the right which they claim.

The plaintiffs did not prove the existence of any covenant or agreement binding the defendant not to build over his own back yard so as to interfere with the comfort of the plaintiffs; and there are no materials for holding that any covenant to that effect was ever in fact entered into. But in the absence of such a covenant, express or implied, the plaintiffs' claim to relief in respect of air cannot, in my opinion, be supported.

The appeal must, therefore, be allowed; the judgment must be reversed, and the plaintiffs must have judgment for 10*l.* for the injury done to their ancient light and for the costs of the action, except so far as they have been increased by the claim to air. They must also pay the costs of the appeal, and the costs must be set off against each other in the usual way.

Solicitors: *Torr, Gribble, Oddie & Sinclair, for Roberts & Andrews, Exeter; Templeton & Cox, for G. Hirtzel, Exeter.*

H. C. J.

C. A.
1895
July 2.

In re COALPORT CHINA COMPANY.

Company—Directors—Power to refuse to register Transfer—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 35.

The rule that directors who have power to refuse to register a transfer of shares are not bound to disclose their reasons for refusing, if they have considered the question and have acted bonâ fide, applies to cases where their power is limited to particular grounds for refusal as well as to cases where their power is absolute.

Directors who had power under their articles to refuse to register a transfer if in their opinion the transferee was not a desirable person to admit to membership, resolved, at a meeting held to consider the propriety of registering the transfer, that the registration of the transfer should be refused, without giving any reason for their refusal:—

Held (reversing the decision of Kekewich J.) that, in the absence of any evidence that the directors had not acted bonâ fide, the refusal could not be questioned.

THE Coalport China Company was a limited company registered under the Companies Act, 1862. The founder and governing director of the company was P. S. Bruff, and 183 out of the 200 100*l.* shares of which the capital consisted were held by him and his family.

The articles of association of the company contained the following clauses:—

Art. 29: "No share shall, save as provided by clause 32 hereof, be transferred to a person who is not a member, so long as the founder, or, failing him, any member, is willing to purchase the same at a fair value. In order to ascertain whether the founder, or, failing him, any member, is willing to purchase such share, notice in writing shall be given to the company stating the desire of the holder thereof to transfer the same. Such notice shall specify the number of shares to be sold, the registered numbers thereof respectively, and the sum fixed as the fair value, and shall constitute the company the agent for such sale.

Art. 30: "Every such share shall be offered, in the first place, to the founder, and if he decline the offer then to the members in such order as shall be determined by lots drawn in regard thereto, and the lots shall be drawn in such manner as the

directors shall think fit. The company shall within the space of twenty-eight days after service of the notice intimate in writing whether the founder, or, failing him, any member, is willing to purchase the share at the fair value; and in case any difference arise as to the fair value, the same shall be referred to the decision of two arbitrators, &c."

Art. 31 provided that after the fair value had been ascertained the member selling should be bound to transfer the shares to the founder or member purchasing; but if the company should fail to intimate in writing that the founder or any member was willing to purchase the shares, the holder should be at liberty, subject to clause 33, to sell and transfer the same to any person at any price.

Art. 33: "The directors may refuse to register any transfer (*a*) where the company has a lien on the shares; (*b*) where it is not proved to their satisfaction that the proposed transferee is a responsible person; (*c*) where the directors are of opinion that the proposed transferee is not a desirable person to admit to membership; but paragraphs (*b*) and (*c*) of this clause shall not apply where the proposed transferee is already a member."

T. A. Middleton was one of the original subscribers to the articles of association. Being desirous of retiring from the company, he agreed to sell his share to W. Bell for 165*l*. He accordingly forwarded notice to the company on November 27, 1894, in pursuance of art. 29, of his desire to sell the share and of the price at which he valued it, which he placed at 250*l*. On December 13, Mr. A. B. Garrett, the secretary of the company, wrote in reply, objecting that the company ought to be informed as to eligibility of the proposed transferee, and that the value fixed was much too high, and that Middleton was indebted to the governing director. No steps, however, were taken by the company to ascertain the true value of the share; and after the expiration of twenty-eight days, no notice having been given that the founder or any other member was willing to take the share, Middleton, on January 15, 1895, forwarded to the secretary a transfer of the share to Bell at the price of 165*l*.

On February 15, 1895, the secretary informed Middleton that the directors were unable to agree to the proposed transfer, but

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gave no reason for their objection. No formal meeting appears to have been held owing to the illness of the governing director until April 18, 1895, when a meeting was summoned having for its object, among other things, to consider the propriety of registering the transfer. At this meeting a resolution was passed "that the registration of the recent transfer by Mr. Middleton to Mr. Bell of share No. 198 in the company be refused." The secretary gave notice of this to Middleton's solicitor in a letter of April 24, in which he said, "I am instructed by my directors to inform you that at their board meeting, held on the 18th inst., the question of the propriety of the desired registration of the transfer to Mr. W. Bell of the share No. 198 in the company of your client Mr. T. A. Middleton was considered, and that the directors upon such consideration resolved that the registration of such transfer should be refused."

A motion was made by Bell and Middleton before Kekewich J., under the 35th section of the Companies Act, 1862, for rectification of the register of the company by substituting the name of Bell for that of Middleton as the owner of the share. No evidence, except what appeared from the letters, was offered as to the motives of the directors in refusing to register the transfer, nor of the desirability of Bell as a member of the company. But evidence was adduced shewing that the company had no lien on the share, and that Bell was a responsible person; and this was not denied by the directors.

Kekewich J. held that the directors had no power to refuse to register the transfer except on the ground that the transferee was not a desirable person, and that the directors had not considered the desirability of Bell nor exercised their discretion on this point. He therefore ordered the register to be rectified as asked. The company appealed.

Bramwell Davis, Q.C., and *B. Freeman*, for the appellants. The directors are not bound to state the reasons for which they declined to register the transfer. They had power to refuse if they considered that the transferee was not desirable as a member; and it is to be assumed that they rejected him on that ground, unless there is some evidence that they did not act bonâ

fide, or that they did not consider the question at all. It is for the applicant to prove this, and he has not done so. On the contrary, it is clear that the directors did consider the matter, and did exercise their discretion on it, for the meeting of April 18, 1895, was specially summoned for that purpose: *Ex parte Penney*. (1)

Warrington, Q.C., and *G. Cave*, for the respondents. If the directors had possessed an absolute power of refusing to register transfers, as in *Ex parte Penney* (1), it would have been sufficient to shew that they had considered the matter, no mala fides being proved. But here the directors had only a limited power, and could only reject a transferee on one of three grounds. We are entitled to know on which, if any, of those grounds they rejected Bell; they may have rejected him for some totally irrelevant reason. Indeed, the correspondence points to their dissatisfaction at the price at which the share was offered to the old members being the real reason for the refusal: *In re Stranton Iron and Steel Company* (2); *In re Bell Brothers* (3); *Moffatt* v. *Farquhar*. (4)

LINDLEY L.J. This appeal must be allowed. The question raised is an extremely simple one; and before I read the articles I will state shortly the principle which I think is applicable to it. Under the articles the directors have a power to refuse a transfer. I will not say at present for what reasons: I will allude to them presently. They do refuse a transfer; they do not say why. The argument is, and the view taken by the learned judge is, that it is for them to justify their conduct. Now, that appears to me to be wrong. It is for those who say that the directors have exercised their power improperly to give some evidence to that effect. Here there is absolutely none. Therefore, in common fairness, as a matter of justice between man and man, it strikes me that the decision is based upon an erroneous principle. That was precisely the ground on which the Court of Appeal in *Ex parte Penney* (1) differed from the then Master of the Rolls. I am aware that the articles were not quite the same in this case as in that; but the Master of the

(1) L. R. 8 Ch. 446.
(2) L. R. 16 Eq. 559.
(3) 65 L. T. (N.S.) 245.
(4) 7 Ch. D. 591.

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Rolls there held that the directors were bound, not only to act bonâ fide (which, of course, they are), but that the directors were bound to preserve some kind of evidence that they acted bonâ fide, so that the Court might see that they had so acted. The Court of Appeal said, "No, that is not part of their business; shew us that they have not acted properly, give us some evidence of that kind, and we have ample power to interfere." We must bear in mind that the power of the Court invoked in this case rests on the 35th section of the Companies Act, 1862, which enables the Court to rectify the register if the name of any person is, without sufficient cause, entered in or omitted from the register, or if default is made, or unnecessary delay takes place. Now, who is to prove that? Surely it is for the person invoking the assistance of the Court to prove that the name of some person is, without sufficient cause, entered on or omitted from the register. When all he can say is that the directors have the power to refuse and they have refused, he has not discharged the burden which is imposed upon him.

Mr. Warrington and Mr. Cave have argued that, although that may be true under ordinary articles, it is not applicable to the present, for this reason: These articles are framed upon the theory that the shares shall not be transferred by any shareholder until he has offered them to the other shareholders; and after he has so offered them, and the other shareholders have not elected to buy them, then he has a right to transfer them, subject to clause 33, "The directors may refuse to register any transfer (*a*) where the company has a lien on the shares." The applicant here excludes that because there was no lien. "(*b*) Where it is not proved to their satisfaction that the proposed transferee is a responsible person." There, again, the applicant has brought forward evidence to shew that he is a responsible person, and nobody says he is not. Then "(*c*) where the directors are of opinion that the proposed transferee is not a desirable person to admit to membership." Now, (*a*) and (*b*) being excluded, the directors must have acted, if they have acted at all properly, under (*c*). There is no evidence to shew that they have not acted under (*c*), and no evidence to shew that they have acted improperly. The contention is that, although they have con-

sidered whether they will pass this transfer or not, and whether they will approve of the transfer and of the transferee, yet, because they have not said, or because the minutes do not shew, that they came to the conclusion that in their opinion the proposed transferee is not a desirable person, therefore it is to be inferred that they have improperly exercised this power. I do not infer anything of the kind, nor do I think it necessary in point of law for the minutes to shew, or for the directors to state, that they came to a resolution in those terms. It is said that unless they do the Court cannot hold that they have considered the question. Now, what is the question? The question for them to consider is whether they will or will not refuse to register the transfer. That is the question. The other questions are only reasons or grounds for their conclusion. They have considered that question; and, after the evidence given by the applicant, I cannot help inferring and believing that they have considered the other question whether he is or is not a desirable person. There is no evidence whatever to shew that they have acted in the slightest degree improperly or exceeded their powers.

I wish to be cautious in this matter, because I have not the slightest doubt that the Court has ample power to control the refusal of directors, or the exercise by them of their power to refuse, provided there is some evidence which justifies the Court in coming to the conclusion that they have not done their duty; but in the absence of all such evidence the Court has no right to presume—it is contrary to the ordinary principles of justice to do so—that they have done wrong, but it must be presumed that they have done right. I consequently think that the appeal should be allowed with costs here and below.

LOPES L.J. I am of the same opinion, and have nothing to add.

RIGBY L.J. I have only to add, in consequence of Mr. Warrington's argument that where the power is absolute a different rule applies from where the power is limited, that I do not think that can be maintained. Even though in terms the power is

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absolute, it is a fiduciary power; it is to be exercised for the benefit of the company, and with due regard to the rights of the transferee; so that no power is absolute in that sense; and the Courts have held that they are not bound to say, "We threw aside all external considerations, and applied ourselves to the exercise of the power in a proper manner"; and if they do not do it in that case, I do not see why they should do it when the power itself arises only in certain cases. The fact that they have resolved must be taken, in the absence of positive evidence sufficient to satisfy the Court to the contrary, to mean that they have resolved within their jurisdiction and for right reasons.

Solicitors: *Hepworth & Co.; Powell & Rogers.*

M. W.

HOOD BARRS *v.* CATHCART.

NORTH J.

1895

April 24.

[1894 B. 4837.]

Judgment Debt—Charge on Land—Reversion—Judgments Act, 1838 (1 *&* 2 *Vict. c.* 110), *s.* 13—*Judgments Act*, 1864 (27 *&* 28 *Vict. c.* 112), *s.* 1.

A judgment debt is not enforceable as a charge on a reversion in real estate.

MOTION for judgment on admissions in the pleadings.

The defendant was a married lady. By an indenture dated July, 1887, made in contemplation of her marriage, she conveyed certain real estate to the use of herself till marriage, and after the marriage to the use of herself for life with restraint on anticipation, with remainder, as to some of the premises, to the use of her intended husband for life, and, as to the whole of the premises, with remainder to uses in favour of the children of the marriage, with remainder to the use of herself in fee.

The marriage was solemnized on July 20, 1887. She had no child.

The plaintiff was a judgment creditor of the defendant in respect of solicitor's costs. By an order dated January 22, 1894, leave was given to the plaintiff to issue execution on his judgment. The judgment was registered on April 25, 1894. The plaintiff claimed a declaration that he was entitled to a charge in respect of his judgment debt and interest on the defendant's estate in fee in remainder in the settled real estate, a declaration of the amount due, and foreclosure or sale.

The defendant had put in a statement of defence, denying that the remainder in fee was her separate estate, and denying that the plaintiff had a valid charge on the premises.

S. Hall, Q.C., and *Johnston Edwards*, for the plaintiff. The remainder Mrs. Cathcart is entitled to under the settlement is her separate estate: *In re Onslow.* (1) A remainder cannot be delivered in execution, and therefore the provisions of 27 & 28 Vict. c. 112, s. 1, are not applicable to such an interest in

(1) 39 Ch. D. 622.

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land. We submit that the remedy of a judgment creditor given by s. 13 of 1 & 2 Vict. c. 110, is not intended to be taken away by the later enactment. The object of the provision requiring land to be delivered in execution before a charge is created by a judgment is to produce promptitude on the part of the creditor, and the Court will enforce the charge created by the unrepealed s. 13 of 1 & 2 Vict. c. 110, in the only way that is practicable: *In re Cowbridge Ry. Co.* (1); *Hatton* v. *Haywood.* (2) It is true that in *In re Bailey's Trusts* (3) Malins V.-C. is reported to have said that s. 13 of the Act 1 & 2 Vict. c. 110, is practically repealed, and the cases *In re South* (4), *In re Hamilton* (5), and *In re Anthony* (6) ought to be mentioned as cases that might be cited against us. But the section has not been repealed, and, as we submit, it has been purposely kept alive.

The defendant was not represented.

NORTH J. I think it clear in this case that the plaintiff has not the remedy he asks for. Mr. Hall has put the case very fully and clearly, and I feel that I know quite as much about the other side as I should have done if the defendant in person had appeared and argued her case; but I think the law is against the plaintiff's contention. [His Lordship stated the facts, and proceeded:—]

The ultimate remainder limited to the defendant is not settled to her separate use in terms, but by the effect of the Married Women's Property Act, 1882, it is so settled. She, therefore, is entitled to that remainder for her separate use.

The judgment creditor seeks to obtain legal relief by way of foreclosure or sale against that interest in remainder. But for the Act of 1 & 2 Vict., of course, he could have done nothing at present. He might have obtained an elegit when the time arrived at which the interest in question became an interest capable of being taken by the sheriff under an elegit, and then one moiety of the land might have been taken. But then it is argued that the plaintiff is in a better position under the statute

(1) L. R. 5 Eq. 413.
(2) L. R. 9 Ch. 229.
(3) 38 L. J. (Ch.) 237.
(4) L. R. 9 Ch. 369.
(5) 31 Ch. D. 291.
(6) [1893] 3 Ch. 498.

1 & 2 Vict. c. 110. [His Lordship stated the effect of s. 11 of that Act, and continued:—]

This is not a case in which the sheriff can enter into possession of this land under that section. Then the 13th section gives remedies which did not exist before; it enacts that: "A judgment already entered up or to be hereafter entered up against any person in any of Her Majesty's Superior Courts at Westminster shall operate as a charge upon all lands, tenements, rectories, advowsons, tithes, rents, and hereditaments (including lands and hereditaments of copyhold or customary tenure), of or to which such person shall at the time of entering up such judgment, or at any time afterwards, be seised, possessed, or entitled for any estate or interest whatever, at law or in equity, whether in possession, reversion, remainder, or expectancy." Therefore, this no doubt went a good deal further than s. 11, because it applies to remainders, to which that section did not apply. Then there was a further provision in that section: "Every judgment creditor shall have such and the same remedies in a Court of Equity against the hereditaments so charged by virtue of this Act, or any part thereof, as he would be entitled to in case the person against whom such judgment shall have been so entered up had power to charge the same hereditaments, and had by writing under his hand agreed to charge the same with the amount of such judgment debt and interest thereon." That is followed by a proviso that the judgment creditor could not proceed in equity to obtain the benefit of the charge until the expiration of one year from the time of entering up the judgment—which time has elapsed in the present case.

Now, if that were the only Act we had to deal with, I should say that the plaintiff was entitled to the relief which he asks; but two or three subsequents Acts have been passed relating to judgments, to which it is not necessary to refer, excepting the last of all, that of 27 & 28 Vict. c. 112, which did make a great change in the law. It certainly did affect the previous Acts that I have mentioned, and it did to some extent interfere disadvantageously with the remedies the creditor had or might have under a judgment under the Act of 1 & 2 Vict. That later Act provides: "No judgment, statute, or recognizance to be

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entered up after the passing of this Act shall affect any land (of whatever tenure) until such land shall have been actually delivered in execution by virtue of a writ of elegit or other lawful authority, in pursuance of such judgment, statute, or recognizance." Then the 2nd section provides what "land" is to mean: "The term 'land' shall be taken to include all hereditaments, corporeal or incorporeal, or any interest therein." I need not follow that Act further, I think, except to say that the 4th section provides that any creditor to whom any land of a debtor has actually been delivered in execution by virtue of any such judgment shall be entitled forthwith to obtain in a summary way from the Court of Chancery an order for realization of the property, which order may be served upon the debtor only.

That Act certainly did interfere very much with the creditor's remedy, because it prevented the judgment being a charge on the land until the land had been actually delivered in execution. It does not seem to me to be accurate to say that it repealed the former Act; but, whereas the former Act did require certain things to be done, this required an additional thing to be done before the benefit conferred by the former Act could apply, and it says expressly that no judgment shall affect any land until the land has been actually delivered in execution. Has the remainder in question in this case been actually delivered in execution, either physically or constructively, by anything in the nature of equitable execution? Of course, there has not been and cannot be any legal or equitable execution—at any rate, there has not been either one or the other.

How, then, can it be said that the judgment can affect the land? The suggestion made is this: that the Act which prescribes that no judgment shall affect any land until it has been actually delivered in execution is only meant to apply to such property as can at the moment actually be delivered in execution, and, therefore, that as to reversions, or remainders, or other interests which cannot actually be delivered in execution, the Act does not apply at all. I find no such limitation as to land. The word "land" is very large. There is the interpretation clause with respect to it, which says that it shall include all

hereditaments, corporeal or incorporeal, or any interest therein. How in the face of those words can I say that "land" does not include all land, but merely includes land in possession; and that "any interest" in land can only mean an interest in possession, and that land or an interest in land which is in remainder is entirely outside the Act? It would seem to be an entire departure from the language used, which there is nothing whatever to justify. It is admitted that no case exists which assists the contention of the plaintiff.

In my opinion, the construction of the Act, which is all I have to turn to, is completely against him, and I must dismiss the action, with the usual consequences.

Solicitors for plaintiff: *Hood Barrs & Co.*

D. P.

NICHOLSON *v.* HARPER.

[1895 J. 594.]

Principal and Agent—Pledge to Person in Possession—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *s.* 25, *sub-s.* 1.

A merchant sold wine stored in the cellars of a warehouseman, and afterwards pledged the wine to the warehouseman for advances made in good faith without notice of the sale:—

Held, that the pledge conferred no title to the wine.

In January, 1894, J. and W. Nicholson & Co., Limited, the plaintiffs in this action, purchased from W. C. Goldsmith, of 40, Great Tower Street, 250 dozen old port, described as "Bin 101" in a receipted invoice delivered to the plaintiffs on January 25, 1894. The wine was stored in the cellars of Messrs. Gammage & Hollingum under an agreement the terms of which were stated in the following memorandum, signed on behalf of W. C. Goldsmith, and dated September, 1893: "I agree to take from you cellar room in your London Street cellars for not more than 4500 dozen wines and spirits, at a rental of 120*l.* per annum for five years from the date of expiration of present existing agreement. Should the quantity of wine, &c., at any time

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exceed 4500 dozen I agree to pay you an additional rent to be mutually agreed."

No special part of Messrs. Gammage & Hollingum's cellars was set apart for the wine of Goldsmith. An order on Messrs. Gammage & Hollingum for delivery of the wine to the plaintiffs was sent to the plaintiffs, but no notice of the purchase was given to Messrs. Gammage & Hollingum till after the transactions next mentioned.

On May 31, 1894, W. C. Goldsmith signed a memorandum of lien in favour of Messrs. Gammage & Hollingum in the following terms:—

"In consideration of you having advanced to me this day the sum of £1500 as a loan for twelve months at 7 per cent. per annum interest, I hereby give you as collateral security a lien on all wines and spirits now lying in your cellars at 16, London Street (and also on any that may hereafter be sent in), and in addition I have given you three acceptances of £500 each and due 31st May, 1895.

"The interest, as stated above, to be paid every three months commencing 31st August, 1894."

On November 7 W. C. Goldsmith signed a further memorandum of charge in favour of Messrs. Gammage & Hollingum as follows:—

"In consideration of your accepting, for my accommodation, the two drafts enclosed, viz.: £149 17*s.* due 5th February, 1895, £200 due 11th February, 1895, I give you as security for these and any similar drafts you may hereafter accept for me, all my stock of wines and spirits held by you over and above those you retain as security for your loan to me of May 31st last."

A receiving order had been made against Goldsmith. The wine pledged to Messrs. Gammage & Hollingum was advertised for sale by auction on their behalf on April 4 and 5, 1895. The 250 dozen port sold to the plaintiffs was catalogued for sale on April 5. The writ in this action was issued on the 4th of April against Harper, the auctioneer, and Messrs. Gammage & Hollingum; and by it the plaintiffs claimed an injunction to restrain the sale and delivery of the 250 dozen port bought by them. An ex parte interim injunction had been granted. The action

was now brought on on motion to continue the injunction till hearing; and the motion was treated as the trial. The defendant Harper had been dismissed.

Swinfen Eady, Q.C., and *Eve*, for the plaintiffs. The only suggestion of title on behalf of the defendants is that some authority was conferred on Goldsmith to pledge by the Sale of Goods Act, 1893, s. 25, sub-s. 1. But this case is not within that section; in the first place Goldsmith did not and could not remain in possession of the goods, or any mercantile documents of title, and never delivered or transferred either the goods or any documents of title to the pledgees, who already had the goods; and no documents of title are shewn to have existed.

Vernon Smith, Q.C., and *Rowden*, for the defendants Gammage & Hollingum. We claim to be entitled under s. 25, sub-s. 1, of the Sale of Goods Act, 1893, which enacts that, where a seller remains in possession of goods, or the documents of title to goods, and delivers or transfers the goods or documents of title to a buyer or pledgee, who takes in good faith, without notice, the seller confers a good title. Our argument is that Goldsmith was in constructive possession of the 250 dozen port, and transferred the goods, or some interest in the goods, within the meaning of the enactment.

Swinfen Eady, Q.C., in reply.

NORTH J. (after stating the facts). The question is whether Goldsmith was in a position to give a valid charge on the plaintiffs' goods in favour of the defendants. Before the Factors Act, 1889 (substantially re-enacted as to the matters now in question by s. 25, sub-s. 1, of the Sale of Goods Act, 1893), there were rules of law relating to the sale of goods into which I need not now go beyond saying, that, independently of the Act, Goldsmith could not give a title to the goods. Therefore, the claim, if any, of Messrs. Gammage & Hollingum must be established under s. 25 of the Sale of Goods Act. Sub-s. 1 enacts, "where a person having sold goods"—in this case that is Goldsmith—"continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer

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by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same." If Goldsmith had been authorized by the owners to make the pledges, of course they would have been bound. The question is, as he was not actually authorized, whether the Act puts him in the position of being expressly authorized. The only case in which the seller is placed by the Act in the position of being so authorized is where he continues or is in possession of the goods or documents of title. In such cases the Act makes the delivery or transfer of the goods or documents of title to a person receiving the same in good faith authorized. Therefore there must be some delivery or transfer, whatever that may mean, after the sale, without notice that such sale had taken place. In the present case the defendants were themselves in possession of the goods long before the sale, and have continued in the same position till the present time. There has been no alteration in that respect. I read the Act to mean that there must be a delivery of the goods by the seller in possession, or, where there is no delivery of the goods, the transfer of documents of title—well-known mercantile documents, defined by the Act by reference. That being so, in the present case there has been no delivery to the defendants since the sale at all, and no transfer of any documents of title; nor could there have been, for there were no such documents. But Mr. Vernon Smith says the Act works a constructive transfer of the goods, or a transfer of some interest in the goods. I do not see how a person is protected in the possession of the goods by the Act, unless the requirements of the Act have been satisfied; and I do not see how there has been anything like a transfer of the goods, even assuming that the word "transfer" is applicable to the goods. In point of fact, the defendants have been in possession of the goods ever since the sale, and there has been no delivery or transfer to them of any kind since the sale. The defendants have acted perfectly fairly and honestly in keeping

the goods; as there was a legal point to be decided, they were entitled to keep the goods till that point was decided. Whatever warehouse charges they have will not be prejudiced. The order will be: The plaintiffs undertaking to pay to the defendants their warehouse charges, if any, order the defendants upon such payment to deliver up the goods to the plaintiffs.

Solicitors for plaintiffs: *Nash, Field & Co.*

Solicitors for the defendants Gammage & Hollingum: *Park Nelson & Co.*

D. P.

HARLE *v.* JARMAN.

[1894 H. 3722.]

Married Woman—Reversion—Election.

A separation deed executed in 1875, not acknowledged by the wife, provided for payment by the husband of an annuity to the wife; who covenanted to release, when discovert a reversionary life interest in real and personal estate:—

Held, that on the death of the husband the wife was not bound to release her life interest by having received the annuity.

The doctrine of election by a married woman discussed.

On the marriage of Johnson Harle and Louisa Patrick in May, 1873, real and personal property belonging to the husband was settled on trust, as to the income, for the husband during the joint lives of husband and wife, with remainder for the survivor for life; and as to the capital, in the events which happened, for the benefit of the children of the husband by a former marriage; and certain furniture belonging to the husband was settled on the wife for life for her separate use.

Johnson Harle, by his marriage with Miss Patrick, became entitled to a reversionary interest in some property under a deed of family arrangement made in 1870, to which Miss Patrick was a party.

There was no issue of the marriage. Early in 1875 Mrs. Harle filed a petition in the High Court for judicial separation. On the hearing of the petition an arrangement between the parties

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was proposed; the petition was ordered to stand over, and the parties were allowed to file terms of arrangement. Such terms were filed and carried out by two deeds, dated June 30, 1875—a separation deed and an ancillary deed of charge—and the petition was dismissed.

The separation deed was made between Johnson Harle, Louisa Harle, his wife and trustees, who were the same persons as the trustees of the marriage settlement. By the operative parts of the deed Johnson Harle renounced his interest under the deed of family arrangement of 1870; and Louisa Harle released and assigned to Johnson Harle her beneficial interest in the furniture comprised in the marriage settlement; and it was mutually covenanted by the husband and wife (1.) That Louisa Harle might live separately; (2.) That Johnson Harle and his representatives would pay Louisa Harle, during the joint lives of herself and her mother, an annuity of 220*l.*, and after the death of her mother an annuity of 150*l.*, charged by deed of even date on the property other than furniture comprised in the marriage settlement; (3.) That the annuities should be paid through the trustees to Louisa Harle, for her separate use, without power of anticipation; (6.) "The said Louisa Harle shall and will upon the death of the said Johnson Harle, if she shall survive him, forthwith execute a valid release and assignment in such form as counsel, on behalf of the executors or administrators of the said Johnson Harle, shall require, and at the expense of the person or persons requiring the same, of all her interest of and in the premises comprised in or otherwise subject to the trusts of the hereinbefore recited indenture of settlement of May 6, 1873, to the intent that her interest therein may become absolutely extinguished"; (7.) That the pending petition for judicial separation should be dismissed; and (8.) That in case of reconciliation and in certain other events the separation deed should be annulled. This deed was not acknowledged by Mrs. Harle.

By the ancillary deed of June 30, 1875, Johnson Harle assigned all his beneficial interest in the property, other than furniture, comprised in his marriage settlement, to the trustees of the marriage settlement as security for the due payment of her annuity.

Down to 1878 the annuity payable to Mrs. Harle was kept down; since that time she had been in receipt of the income of the property comprised in the deed of charge of June 30, 1875; but it was not sufficient to pay the whole of the annuity, and the annuity was consequently in arrear. Johnson Harle became bankrupt in 1880. Mrs. Harle's mother died in 1881.

Johnson Harle died in 1891. After his death negotiations passed between his children and Mrs. Harle with the object of her releasing her life interest in the property comprised in the marriage settlement in pursuance of art. 6 of the mutual covenant in the deed of separation. Mrs. Harle's advisers insisted that she was entitled to have the deed necessary to carry out that article settled in such form as to keep alive an interest in the settled funds during her life in favour of her late husband's estate, and to give her a charge on such life interest to the extent of the annuity she was entitled to. The advisers of her stepchildren insisted that the release ought to enure for their benefit so as to accelerate their reversionary interests. The parties not being able to agree, this originating summons was taken out by some of the children of Johnson Harle to have it determined whether, having regard to the provisions of the separation deed of June 30, 1875, Mrs. Harle was now entitled to any life or other interest in the premises subject to the trusts of the settlement except furniture.

The defendants were Mrs. Jarman, one of the children of Johnson Harle, Louisa Harle, the widow, and the trustees of the settlement.

Gatey, for the plaintiffs, and *Wheeler* for Mrs. Jarman. If Mrs. Harle is bound by her covenant to release, the effect of such release is to accelerate the remainders over. The settled property, therefore, goes under the settlement to the children of Johnson Harle: *Jull* v. *Jacobs* (1); *Fuller* v. *Fuller* (2); *Snow* v. *Boycott*. (3)

If the remainders over are not accelerated, the effect of the release will enure for the benefit of the estate of Johnson

(1) 3 Ch. D. 703. (2) Cro. Eliz. 422.
(3) [1892] 3 Ch. 110.

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Harle. The estate pur autre vie coming to him in that way is not included in the charge of his beneficial interest under the settlement.

Mrs. Harle, it is true, could not assign her reversionary interest in personalty, and did not go through the formality necessary to bind her reversionary interest in realty; but a married woman is capable of confirming an invalid transaction, or of electing, by taking a benefit under an instrument, to give up what such instrument intended she should give up.

Mrs. Harle by receiving the annuity has precluded herself from taking the life interest she covenanted to extinguish: *Barrow* v. *Barrow* (1); *Cahill* v. *Cahill* (2); *Buckmaster* v. *Buckmaster* (otherwise *Seaton* v. *Seaton*) (3); *In re Hodson* (4); *Wilder* v. *Pigott* (5); *Greenhill* v. *North British and Mercantile Insurance Co.* (6)

[NORTH J. I do not see how Mrs. Harle, if she could not bind herself by solemn deed, could do so by receiving money.]

In some of the cases the matter is put on the ground of fraud. We also contend that the sanction of the High Court in the divorce proceedings confirmed the covenant by Mrs. Harle; and that she has also by her conduct since she became discovert confirmed it.

Archibald Brown, for Mrs. Harle and the trustees. The object of the separation deed and the contemporaneous deed of charge was to give Mrs. Harle an annuity for the whole of her life and charge that annuity for the whole period on the property comprised in the settlement; she was intended only to give up her life interest to the extent of any surplus over her annuity; and, on the true construction of this deed, her life interest was to be kept alive for the benefit of her husband's estate, and it became part of his interest in the settled property, which was covered by the deed of charge: *Salt* v. *Marquis of Northampton*. (7) Supposing this intention has not been carried out by the strict language of the deeds, the Court has power to rectify them: *Olley* v. *Fisher*. (8)

(1) 4 K. & J. 409.
(2) 8 App. Cas. 420.
(3) 35 Ch. D. 21; 13 App. Cas. 61.
(4) [1894] 2 Ch. 421.
(5) 22 Ch. D. 263.
(6) [1893] 3 Ch. 474.
(7) [1892] A. C. 1.
(8) 34 Ch. D. 367.

But the covenant by Mrs. Harle to release her life interest was altogether inoperative and void. She did not and could not confirm it during coverture, nor could the High Court confirm it; there was not even an attempt in the divorce proceedings to obtain such confirmation. The cases relied on by the other side, where a transaction voidable, not void, has been confirmed, are inapplicable. In certain cases a married woman can elect; but the doctrine of election is not applicable where a married woman has a beneficial interest she cannot give up; to raise a case of election by a married woman there must be alternative benefits, either of which she can give up while she takes the other: *Purdew* v. *Jackson* (1); *Robinson* v. *Wheelwright* (2); *Buckmaster* v. *Buckmaster* (otherwise *Seaton* v. *Seaton*) (3); *Stamper* v. *Barker* (4); *Cahill* v. *Cahill.* (5)

Gatey, in reply.

NORTH J. [After stating the facts, decided that the effect of the covenant by Mrs. Harle to extinguish her life interest, had it been valid, would have been to accelerate the interests of those in remainder; and further that, if the covenant had enured to the benefit of the husband's estate, any interest he would have been entitled to under that covenant was not comprised in the contemporaneous deed of charge.

He held that the covenant by Mrs. Harle to release her reversionary life interest was void. On this part of the case he commented on *Stamper* v. *Barker* (4); *Wall* v. *Wall* (6); *Robinson* v. *Wheelwright* (2); *Cahill* v. *Cahill* (5); *Seaton* v. *Seaton* (7), and the same case in the Court below, nom. *Buckmaster* v. *Buckmaster* (8), and proceeded:—]

That case, with others, settles the question that the approval of the Divorce Court of this compromise would not help the matter; but there is this to be said in addition: I do not see that there was any approval by the Court of the compromise in any such way as purported to give a greater validity to the agreement of the parties, because in point of fact the Court did

(1) 1 Russ. 1.
(2) 6 D. M. & G. 535.
(3) 35 Ch. D. 21; 13 App. Cas. 61.
(4) 5 Madd. 157.
(5) 8 App. Cas. 420.
(6) 15 Sim. 513.
(7) 13 App. Cas. 61.
(8) 35 Ch. D. 21.

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not approve of the terms which were settled; it left those entirely to the parties: they were settled by the parties; and, the parties having settled them, the Court merely stayed proceedings on the petition by consent.

Then there is this to be said about the present case. There are many cases in which it has been stated that a married woman might be bound by reason of her having committed a fraud. It is not suggested that there was any fraud in this case. Everything here was perfectly clean and clear and above-board. The rights of the parties were correctly appreciated and set out in the two instruments of June 30 to which I have referred, and it was quite clear to the parties at the time that the interest of the wife was a reversionary interest, and one with which she was not competent to deal at the time. This is evident, because she did not purport to assign the reversionary interest, but only covenanted that after the coverture should come to an end by the death of the husband, when the reversionary life interest should have fallen into possession, she would assign. It is quite clear that the parties had before them what the rights of the respective persons previous to the arrangement were, and they entered into the arrangement as actually made with their eyes open.

Then it was suggested that there had been some confirmation by Mrs. Harle. This interest was reversionary until the husband's death; and, if she could not bind it by the arrangement made on the separation, she had no more power to bind it at any later period during her husband's life. It still was an interest in reversion; and the original incompetency to deal with it continued down to the time when the husband died. The husband died in 1891. There have been times since then, no doubt, when she might have confirmed it; but I do not find that there has been a confirmation by her since that time. She was quite willing to carry out the arrangement made according to the view taken by her and her legal advisers of what her rights in the matter were; but she never agreed to carry it out in any other shape than that which they insisted was her legal right. In my opinion, they were mistaken in the view they took of what her legal right was; but then, on the other hand, that cannot

make a consent to carry a provision in the settlement out according to the view she took a consent to carry it out, or a confirmation of it, according to a totally different construction which she and her advisers from the first repudiated.

Then we come to the remaining point as to an alleged election made by her in entering into and acting on the arrangement contained in those deeds at that time; and that is a part of the case that has given me more difficulty than anything else.

In *Seaton* v. *Seaton* (1) Lord Macnaghten pointed out in his judgment the fact that the case before him then was not a case of election at all. He says (2): "It must be borne in mind that there is no question here of election. The husband settled nothing of his own. The wife was entitled to repudiate the settlement which is said to be hers when she became discovert. By so doing she disappointed no one who had contributed to the settlement. She raised no question of election. To confirm the settlement (if that be the proper expression) it would have been necessary for her to have made a new gift. Until a gift be actually perfected, the donor may always withdraw." Yet it was said that according to the cases of *Barrow* v. *Barrow* (3), *Wilder* v. *Pigott* (4), and other cases, a married woman may elect, and particularly the later case of *Greenhill* v. *North British and Mercantile Insurance Co.* (5) before Stirling J., which is a case I must refer to. But first of all I will refer to *Barrow* v. *Barrow* (3), a leading case, perhaps, on a married woman's right to elect and her power of election. It is necessary to look at what the facts there were: By ante-nuptial settlement, the intended husband covenanted to settle lands, of which the intended wife, then an infant, was tenant in tail, upon trusts for her separate use for life, remainder for himself for life, remainder for the children of the marriage. The wife, having attained twenty-one, filed a bill by her next friend against her husband, and obtained a decree for specific performance of the covenant; and, by virtue of the decree, she received during the husband's lifetime certain rents. It was held "that these acts

(1) 13 App. Cas. 61.
(2) Ibid. 80.
(3) 4 K. & J. 409.
(4) 22 Ch. D. 263.
(5) [1893] 3 Ch. 474.

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on the part of the wife amounted to an election, and that she was bound by the decree; and she was ordered to settle the premises accordingly." The case of *Wilder* v. *Pigott* (1) was a very similar case. That was a case in which, the wife being an infant, personal property derived under her father's marriage settlement was assigned by the husband and wife to trustees upon the usual trusts. There was a covenant by the husband that he and his wife would so soon as she should attain the age of twenty-one years convey and assign real and personal property to which she was entitled under the will of her father; and it was provided that if the wife should refuse or neglect to do so it should be lawful for the trustees to accumulate any part of the income payable to her for the other persons interested under the settlement. There was an agreement to settle the wife's after-acquired personal property. The wife, on April 13, 1874, a week after she attained the age of twenty-one, and her husband executed a deed, which she acknowledged, by which she assigned all the personal property expressed to be assigned by the settlement which had not become vested in possession, and conveyed property purported to be conveyed by the settlement upon the trusts thereof. At the date of the settlement she was contingently entitled to a reversionary interest in personal estate, but it was not actually assigned by the deed of confirmation because it did not come within the provisions of Sir R. Malins' Act (20 & 21 Vict. c. 57). It fell into possession, and it was by the direction of the wife and her husband invested in the names of the trustees. The husband had died, and the wife had become of unsound mind, but not so found by inquisition; and it was held, following the cases of *Barrow* v. *Barrow* (2) and *Smith* v. *Lucas* (3), that the wife could during her coverture elect to confirm the settlement, and that she had by her acts elected. Kay J. says (4): "The first question is whether the wife could elect during her coverture to confirm the settlement. It seems clear from the decisions in many cases, of which *Barrow* v. *Barrow* (2) and *Smith* v. *Lucas* (3) are examples, that she could so elect. Then has she in fact elected? I cannot doubt

(1) 22 Ch. D. 263.
(2) 4 K. & J. 409.
(3) 18 Ch. D. 531.
(4) 22 Ch. D. 267.

that the acts which I have referred to, and which manifested a deliberate intention on her part to recognise the settlement, amounted to an election to confirm it. The effect of such a confirmation was to make the settlement as binding and as operative in equity as it would have been if she had been of full age at the time when she executed it. In that case it is not disputed that this contingent reversionary property would have been bound in equity by the settlement. It was more than a mere expectancy, it was property to which she was at the date of the settlement contingently entitled in reversion; and it seems to come within the very words of the first assignment as well as of the covenant. The covenant, as was remarked in *Smith* v. *Lucas* (1), was not void but only voidable, and when ratified was as binding as if it had been originally made by a person who was sui juris." Then come these very noticeable words—"of course no case of election arises." So, although he has been speaking all along of the wife electing, yet he was using the word "electing" in the general sense as referring to the case of a wife adopting a settlement—choosing to approbate or reprobate—whether she would adopt or reject it; and he was not referring to election in the technical sense of the choice by a person who can take either of two things as to which of the two she elects to take. Then these words at the end are very remarkable in that view of the case—"no election arises." There he is using the word "election" in the strict sense, and saying that the election of an infant when of age to confirm a deed executed by that infant during infancy, although you may call it election if you like, is not election in that strict sense. Therefore, those two cases simply come to this: the infant executes a deed; the infant is not absolutely bound, because the deed is not void, but is voidable; and the infant may, at any reasonable time after coming of age, repudiate and reject it; but if the infant chooses, instead of rejecting it, to confirm it, that is a thing that a married woman is perfectly competent to do; and it has been held that she may do it even by a deed not acknowledged; and that is, as he says, not an election.

Then there is another case before Chitty J., which was also

(1) 18 Ch. D. 531.

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cited and relied on; but that seems to me to be exactly the same thing. That was the case of *In re Hodson.* (1) The headnote is, "Where a married woman, after attaining twenty-one, by deed though unacknowledged, affirms a settlement executed by her before her marriage, whilst an infant, such settlement is binding on her." Chitty J. refers to *Barrow* v. *Barrow* (2) and to the decision of Kay J. in *Wilder* v. *Pigott* (3), which he says is not distinguishable from the case before him, and adds (4): "There the married woman had by deed elected to confirm a settlement made by her while an infant, and it was held that her contingent interest in personalty was thereby bound. The circumstance that the deed had been acknowledged by her was immaterial, because Vice-Chancellor Malins' Act did not apply to the interest in question. The case, therefore, stands upon the deliberate intention of the married woman, expressed in writing, to recognise as binding a settlement which was voidable by reason of her infancy." Therefore, those three cases are quite clear and intelligible. There was a deed that an infant could enter into, subject to avoiding it after attaining twenty-one. An infant might choose not to avoid it, but, on the contrary, to be bound by it; and the fact that the infant on attaining twenty-one was married did not prevent that.

There is one other case that has given me more difficulty in dealing with—that is the decision of Stirling J. in *Greenhill* v. *North British and Mercantile Insurance Co.* (5) There the facts were very different from those in this case; but I must say, on reading that case carefully, that the learned judge does seem to have come to the conclusion that there were sufficient acts done in that case to enable a woman to bind the reversionary interest in personalty, while she was covert. He says (6): "In the present case an agreement for a settlement was come to before the marriage of Mr. and Mrs. Greenhill; and but for the provisions of the Statute of Frauds that agreement would have been completely binding on all parties. That statute prevented any action being brought on the agreement against Mrs. Greenhill,

(1) [1894] 2 Ch. 421.
(2) 4 K. & J. 409.
(3) 22 Ch. D. 263.
(4) [1894] 2 Ch. 427.
(5) [1893] 3 Ch. 474.
(6) Ibid. 482.

though she might have brought an action to enforce it against Mr. Greenhill"—that is, because he signed it and she did not, she not being bound at the time. "She did not bring an action, but by her acts she recognised the agreement, and elected to have the benefit of it. To such a state of things the principles laid down in *Barrow* v. *Barrow* (1) and *Wilder* v. *Pigott* (2) appear to me to be applicable"; and then he holds that that being so those cases were an authority for his arriving at the conclusion at which he did there. But those two cases do not seem to me to bear on it for the reasons I have just mentioned; because those were cases where an infant was bound subject to avoiding the deed, and nothing could be chosen but to avoid the deed. In the case before Stirling J., Mrs. Greenhill was not an infant, no doubt; but, on the other hand, she had never executed the deed or signed the agreement, and, therefore, she was not bound. However, in that case Stirling J. came to the conclusion that *Barrow* v. *Barrow* (1) and *Wilder* v. *Pigott* (2) were authorities that enabled him to come to the conclusion, upon the facts, to which he did come. I do not see that those cases really applied to that case or apply to this, although, no doubt, his decision may have been perfectly right, having regard to the different state of circumstances which was said to amount to confirmation in that case.

There are cases which were relied on as to the question of election. In the present case I do not find that Mrs. Harle ever was in a position to elect according to the strict legal view of what is election; she never did choose between two different things, doing one thing or doing another, she having the power to do both. She was clearly barred, to the knowledge of all parties, from dealing with her reversionary interest in 1875; and, therefore, in my opinion, the agreement made at that time does not bind the interest.

Solicitors: *Close & Co.; Creeke & Co.*

(1) 4 K. & J. 409. (2) 22 Ch. D. 263.

D. P.

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May 30, 31.

In re DEBENHAM & WALKER.

Solicitor and Client—Costs—Taxation—Taxation on Solicitor's Application—Amount found due from Client—Mode of enforcing Payment.

When in the Chancery Division the common order for the taxation of a solicitor's bill of costs is made on his own application (the order containing no direction for payment by the client), and the taxing master certifies that a balance is due from the client, the solicitor cannot enforce payment of the balance by summons, but must proceed by action against the client.

SUMMONS by Messrs. Debenham & Walker, solicitors, asking for an order that Mary Louisa Dodd, spinster, should within four days pay to the applicants the sum of 72*l.* 4*s.* 1*d.*, being the amount certified to be due from her to them by the certificate of the taxing master, made pursuant to an order dated July 7, 1894.

The order was made upon the petition of Debenham & Walker. It was the common order to tax their bills of costs in relation to business transacted by them for Miss Dodd. The order directed the master to certify the amount due from Miss Dodd to the petitioners or from the petitioners to her (as the case might be); and it was ordered that the amount (if any) so to be certified to be due from the petitioners be paid within twenty-one days after service of the order, and of the taxing master's certificate to be made in pursuance thereof, by the petitioners to Miss Dodd; and, in case Miss Dodd should pay to the petitioners such sum as might be certified to be due to them without further order, or in case the master should certify that there was nothing due to the petitioners, or that they had been overpaid, it was ordered that the petitioners should deliver to Miss Dodd, upon oath, all deeds, &c., in their custody or power belonging to her. The order did not contain any direction that Miss Dodd should pay to the petitioners the amount (if any) which might be certified to be due from her to them.

The taxing master by his certificate, dated December 17, 1894, certified that the sum of 72*l.* 4*s.* 1*d.* was due from Miss Dodd to the petitioners.

This amount not having been paid by Miss Dodd, the present summons was issued.

Mulligan, for the solicitors. The solicitors are entitled to enforce by summons the payment by the client of the amount which has been found due from her upon the taxation; they are not bound to bring an action. In the Queen's Bench Division the payment of the amount found due by the allocatur, either to the client or solicitor, may be enforced by a judge's order for payment of the same and issuing execution on the order: Chitty's Archbold's Practice (14th ed.), p. 159.

The jurisdiction conferred by s. 37 of the Solicitors Act of 1843 has been transferred to the High Court: *In re Pollard* (1); and this must apply equally to s. 43. The practice should be the same in both Divisions of the Court. At one time it was the practice in the Chancery Division to insert in orders for taxation made at the instance of a solicitor a direction for payment of the amount found due "by the party from whom to the party to whom the same shall be certified to be due": Daniell's Chancery Forms (3rd ed. 1879), pp. 1135, 1136; Seton on Judgments (4th ed. 1877), pp. 604–606. This practice was altered in 1883; and since that time it has been the practice not to insert a direction for payment by the client of what may be found due from him: *Re Harcourt.* (2) The order of July 7, 1894, is no doubt right in form; but it is submitted that it implies that after the taxation is completed, if a balance is found due from the client, the solicitor is to be at liberty to apply for an order for payment by the client: *Fritz* v. *Hobson.* (3) When the form of the order was altered in 1883 it was not intended that the solicitor should be driven to bring an action against the client for the amount due from him. If the client appears upon the taxation, as she did here, the solicitor can obtain an order for payment, and need not bring an action.

Methold, for the client, was not heard.

NORTH J. In my opinion this application is entirely misconceived. When a client applies for a taxation of his solicitor's

(1) 20 Q. B. D. 656. (2) 32 Sol. J. 92.
(3) 14 Ch. D. 542.

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bill of costs, his petition contains an undertaking by him to pay the balance (if any) which may be found due from him to the solicitor upon the taxation, and the result is that the order for taxation contains a direction for payment of that balance by the client accordingly, the Court having jurisdiction over him by virtue of his undertaking. Payment of the amount found due can then be enforced against the solicitor, or against the client, as the case may be, the Court having jurisdiction over the solicitor as its own officer, and over the client by reason of his undertaking. When, however, the application for taxation is made by the solicitor, no such undertaking is given by the client. The solicitor is bound to pay the balance found due from him whether he does or does not give an undertaking to do so; but no order is made for the payment of the balance which may be found due from the client, because, in the absence of his undertaking, the Court has no jurisdiction over him. Under the old practice of the Court of Chancery, an order for taxation made on the solicitor's application did not contain any direction for payment by the client to the solicitor. But it was necessary that the taxing master should certify the amount (if any) which was due from the client to the solicitor, because the order contained a direction that, on payment of what should be found due to him, the solicitor should deliver up the client's documents which were in his possession. For a short time this original practice was departed from, and it became the practice to insert in an order for taxation obtained by a solicitor a direction that the amount certified to be due should be paid "by the party from whom to the party to whom" the same should be certified to be due. But this form of order was found to be inconvenient, and the old practice was restored in 1883. And in *Re Harcourt* (1) Stirling J. said that an order for taxation made on the application of a solicitor was right in not containing any direction for payment by the client to the solicitor of the amount which might be found due from him. This practice has been followed ever since then, and to enforce payment of the amount the solicitor must bring an action against the client under Order XIV. Such actions are very common. For a time, no doubt, as I have

(1) 32 Sol. J. 92.

said, it was the practice to insert in the order for taxation a direction that the client should pay to the solicitor the amount (if any) found due to him. Why should that practice have been altered and that direction have been omitted from the order, if it is right now, after the taxation has taken place and a balance has been found due from the client, to make another order to the same effect as the omitted direction? The result of the alteration would be simply to cause further expense to the parties. The alteration was, in my opinion, made because it was considered right that payment by the client should not be enforced in this summary way. If it could, the client would be deprived of the opportunity of setting up any defence which he might have to the solicitor's bill. If the client has no defence to such an action, a speedy judgment can be obtained under Order XIV. I dismiss this summons.

Solicitors: *Debenham & Walker; Vizard & Nicholson.*

W. L. C.

In re STENNING.
WOOD *v.* STENNING.

[1890 S. 4018.]

Trustee—Banking Account—Appropriation of Payments—Application of Rule in Clayton's Case as between cestuis que trust.

A solicitor paid money which he had received for a client to his own banking account. From that time up to the death of the solicitor there was always to the credit of the account a balance exceeding the sum so paid in. But on many days during that period the credit balance was less than the amount of other clients' moneys which the solicitor had paid in subsequently to his payment of the money of the first client and had not withdrawn:—

Held, that the rule in *Clayton's Case* (1 Mer. 572) applied, and that the money of the first client must be taken to have been drawn out by the solicitor, and therefore not to have formed part of the balance to the credit of the account at the time of his death; and consequently that the first client was not entitled to be paid out of that balance specifically.

Hancock v. *Smith* (41 Ch. D. 456) distinguished.

SUMMONS by Mrs. Sydney Smith, widow, a creditor of C. J. Stenning, a solicitor, who died on November 1, 1890, asking

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that out of a sum of 4443*l.* 11*s.* 8*d.*, which had been paid into Court in the action to a separate account, there might be paid to the applicant the sum of 448*l.* 18*s.* 6*d.* The action was brought by a creditor for the administration of the estate of Stenning; the defendants were his executors. On December 8, 1890, the common administration order was made. The testator had an account at the Bank of England, into which he paid his own moneys, and also moneys belonging to his clients. Mrs. Smith was one of his clients. The testator's estate was insolvent. The sum of 4443*l.* 11*s.* 8*d.* was the balance standing to the credit of the testator's banking account on the day of his death; and it was ordered to be paid into court to a separate account, as Mrs. Smith and other clients of the testator alleged that it consisted of or included moneys belonging to them respectively which had been in the possession of the testator on their behalf in a fiduciary character; and claimed to be paid their moneys out of that balance in priority to any other creditors of the testator. The present summons was taken out to determine the validity of Mrs. Smith's claim. The chief clerk had by his certificate submitted the question to the determination of the judge.

On March 13, 1890, the testator paid to the credit of his banking account the sum of 593*l.* 18*s.* 6*d.*, the proceeds of the sale of a sum of Consols belonging to Mrs. Smith, which he had sold by her direction. Part of this sum was paid by him to her during his life; the balance remaining due from him to her at his death was 448*l.* 18*s.* 6*d.*

On April 23, 1890, the testator had paid to the credit of the account 999*l.* 19*s.*, which he held in a fiduciary character for the trustees of one Thorowgood, who were clients of his. On August 21, 1890, the testator had paid to the credit of the account 1094*l.* 1*s.* 4*d.*, which he held in a fiduciary character for other clients, the trustees of one Cooke; and on August 30, 1890, the testator paid to the credit of his account 500*l.*, which he held in a fiduciary character for other clients, the executors of one Downing. Neither of these three clients had been repaid by moneys drawn from the banking account, and none of them claimed to be paid out of the 4443*l.* 11*s.* 8*d.* standing

to the separate account; but Thorowgood's trustees had been admitted to prove in the action for the sum of 999*l.* 19*s.* There was no evidence whether the other two had been repaid all or any of the sums received from them.

From March 13, 1890, down to the day of his death the balance to the credit of the testator's banking account always exceeded 448*l.* 18*s.* 6*d.* On August 31, 1890, the balance to the credit of the account was 1088*l.* 13*s.* 6*d.*, being much less than the sum of the trust moneys paid in as above stated.

Gent, for the summons. The principle of the decision in *In re Hallett's Estate* (1) is, that the debtor is estopped from setting up the rule in *Clayton's Case* (2) against his cestuis que trust. Those who claim through the debtor are equally estopped. The rule may, as was intimated by Baggallay L.J. in *In re Hallett's Estate* (3), apply as between different cestuis que trust; but none of the persons whose money was paid into the bank after the money of Mrs. Sydney Smith and before August 31, 1890, is now making any claim to earmark the fund. It must be assumed that those persons have been paid in some way, and the case must be dealt with as between Mrs. Smith and Stenning's executors alone, and the latter cannot claim the money as against her: *Hancock* v. *Smith*. (4)

Swinfen Eady, Q.C., and *C. E. E. Jenkins*, for the executors, were not heard.

S. Hall, Q.C., and *Heath*, for the plaintiff.

NORTH J. When the facts, which are somewhat complicated, are understood, I think the law is perfectly clear. [His Lordship stated the facts and referred to the evidence, and continued :—]

Upon the evidence, I come to the conclusion that the money which the testator had received for Mrs. Smith was not held by him upon a trust for her, but that she allowed him to retain it as a loan from her upon which he was to pay her interest. This is conclusive against her claim.

But, assuming that she is right in saying that the money was

(1) 13 Ch. D. 696.
(2) 1 Mer. 572.
(3) 13 Ch. D. 743.
(4) 41 Ch. D. 456.

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a trust fund in the testator's hands, and that it so remained down to the time of his death, it seems to me that there is another answer to her claim. It is said that the 448*l.* formed part of the balance at the bank at the time of the testator's death. It is quite clear to me that it did not. Upon the evidence it is plain that on August 31, on the most favourable view which can be taken of his conduct, Stenning had drawn out from the bank, not only all his own money, but some of his clients' money also. Since Mrs. Smith's money had been paid to the account, he had paid in several other sums of trust money. On April 23 he had paid in 999*l.* 19*s.* belonging to Thorowgood's trustees; on August 21, 1094*l.* 1*s.* 4*d.* belonging to Cooke's trustees; and on August 30, 500*l.* belonging to Downing's executors. On August 31 the balance to the credit of the account, instead of being 3042*l.* 18*s.* 10*d.*, the amount of the trust moneys thus paid in, was only 1088*l.* 13*s.* 6*d.* Of whose money did that balance consist? According to *In re Hallett's Estate* (1), the rule in *Clayton's Case* (2) applies as between two cestuis que trust, whose money the trustee has paid into his own account at his bankers, and therefore this balance consisted of those trust moneys which had been most recently paid in. It is perfectly clear that Mrs. Smith's 448*l.* had been all drawn out before August 31, and had disappeared. Where it had gone I do not know, but her money did not form any part of the balance to the credit of the account on that day, and no part of the balance at the death of the testator can be earmarked as her money.

Hancock v. *Smith* (3) was an entirely different case. There it was proved that all the moneys which had been paid into the stockbroker's banking account were moneys of his clients; and that he had paid to or for all his clients the moneys which he had received for them respectively, except in the case of the four clients who were claiming the balance at his bankers. That case was as different as possible from the present case, where it is proved that the claimant's money has been drawn out of the account. The claim must be disallowed. It has been suggested that, as the other trust creditors have not made any claim against the balance at the bank, it ought to be assumed that

(1) 13 Ch. D. 696. (2) 1 Mer. 572. (3) 41 Ch. D. 456.

they have been paid in some other way. I know, however, that Thorowgood's trustees have been admitted to prove in the action for their debt, and it is idle, therefore, to say that they have been paid. Even if they had I do not see how such payment could create a new trust in favour of Mrs. Smith attaching to the funds then standing to the testator's credit at his bank.

Solicitors: *Burgoynes, Milnes & Greatbach; Sole, Turner & Knight; Tocque & Rodyk.*

W. L. C.

In re FEREDAY.

Contempt—Attachment—Solicitor—Non-payment of Money—Time given by Client—Part Payment by Solicitor—Waiver of right to enforce Attachment.

After a writ of attachment had been issued at the instance of clients against a solicitor, for his non-payment of a sum of 78*l.* which he had been ordered to pay, the clients, at the request of the solicitor, agreed to suspend proceedings under the writ for fourteen days, upon the solicitor paying 25*l.* on account. This was done, but the solicitor did not make any further payment within the extended time, and he was arrested. Upon a motion by the solicitor for his discharge from custody:—

Held, that, by giving time and accepting part payment, the clients had not waived their right to enforce the writ of attachment.

Harvey v. *Hall* (L. R. 16 Eq. 324) distinguished.

MOTION by Henshall Fereday, a solicitor, that a writ of attachment issued against him, under an order dated April 26, 1895, might be set aside, and that the applicant (who had been arrested) might be discharged from custody, on the ground that, at the time he was arrested, he was under no contempt in non-payment of the sum for which he was arrested, and that the costs of the application might be paid by the sheriff and a company called the Glynde Creameries, Limited, at whose instance the writ had been issued.

Fereday had been employed by the company to collect outstanding accounts due to them, and had received moneys for them; and on February 12, 1895, the company obtained an order for the delivery and taxation of his bill of costs. The order contained the ordinary direction for payment by the

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solicitor to the client of the amount (if any) which should be certified by the taxing master to be due from him. The taxing master, by his certificate dated March 15, 1895, found that 78*l.* 3*s.* 3*d.* was due from the solicitor. The order and the certificate were duly served on him, but he did not pay the money.

On April 26, 1895, upon the application of the company and their directors, an order was made that the applicants should be at liberty to issue a writ or writs of attachment against Fereday for his contempt in not paying to them the 78*l.* 3*s.* 3*d.* pursuant to the order of February 12, 1895, and the taxing master's certificate. The Court directed that the order should lie in the office for a week. The writ was delivered to the sheriff on May 4, 1895. The writ was in the form No. 12 in Appendix H. to the Rules of the Supreme Court, 1883, having on it the prescribed indorsement, which stated that the writ was issued for default in payment of money under s. 4 of the Debtors' Act, 1869. On May 7, 1895, Fereday's wife had an interview with Mr. Brand, one of the directors of the company, and implored him not to send her husband to prison, as she was confident he would pay the amount owing from him if further time were given to him. Under this pressure Mr. Brand agreed to suspend the proceedings for fourteen days, provided that a sum of money were paid by Fereday to shew the bona fides of her statement on his behalf. On May 9 Fereday paid 25*l.* to Mr. Brand on behalf of the company, and he instructed the company's solicitors not to take any steps to arrest Fereday for fourteen days from May 9. That period expired on May 23, and Fereday then induced the company to give him a further extension of time for four days—i.e., up to May 27. Fereday made no further payment, and the company's solicitors were then instructed to proceed with the writ. On June 14 Fereday was arrested by the sheriff, and was lodged in gaol.

He deposed that before his arrest he gave notice in writing to both the sheriff and the solicitors for the company that he was advised by counsel that the writ of attachment was void, and that if they arrested him he should apply to be discharged with costs.

Vernon Smith, Q.C., and *Cannot*, for the solicitor. The acceptance of the payment of 25*l.* and the giving further time to the solicitor amounted to a waiver of the right of the company to enforce the writ of attachment: *Harvey* v. *Hall.* (1) The order for an attachment in such a case is made for the benefit of the person who obtains it, the object being to enforce payment of the debt. It is not like an order for the punishment of a contempt of the Court itself.

The writ ought not now to be executed in respect of a debt of 78*l.*, which no longer exists.

Swinfen Eady, Q.C., and *W. A. Peck*, for the company. There is no ground for the application. The arrest was perfectly regular. The writ was issued in respect of a past contempt—the disobedience of an order of the Court. If the debtor tendered part of the debt and the tender was accepted, he could still be arrested for non-payment of the remainder. The debtor is not arrested to make him pay a certain sum of money; he is ordered to be arrested by way of punishment for his past offence. Even if he paid the whole amount, the Court would not as a matter of course order his release from custody. The sheriff is not informed by the writ of the amount of the debt which has not been paid. The object of the indorsement is that he may know that the debtor cannot be kept in prison longer than a year. There has been nothing irregular in the proceedings.

Stewart-Smith, for the sheriff. The sheriff was bound to execute the writ. There is no ground for ordering him to pay costs. He only performed his duty and is, therefore, protected: *Greaves* v. *Keene.* (2)

Vernon Smith, Q.C., in reply.

NORTH J. In my opinion this motion is entirely misconceived. [His Lordship stated the facts and continued:—] The motion is against the company and the sheriff, and it asks that the writ of attachment may be set aside, and the debtor discharged from custody, on the ground that he was not in contempt at the time of his arrest. That is not a ground for setting aside the writ, which was perfectly regular at the time

(1) L. R. 16 Eq. 324. (2) 4 Ex. D. 73.

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when it was issued. It is said that because the company chose to make an arrangement with the debtor that, upon his paying 25*l.* as an earnest of the truth of his representation that he would probably soon pay the whole, a further period of fourteen days should be given to him, the company were therefore incapacitated from afterwards enforcing the writ of attachment: and *Harvey* v. *Hall* (1) is relied on as an authority for this proposition. But that was an entirely different case from the present case. There a solicitor had been ordered to pay a sum of money by a certain day, and afterwards an arrangement was made that he should pay the debt by monthly instalments. He made default in payment of the instalments, and it was held by Bacon V.C. that an order for an attachment could not then be made against the solicitor for his non-compliance with the original order. In the present case, after default had been made in complying with the order for payment, and after hearing the debtor, the Court did direct the issue of the writ of attachment, and it was issued accordingly. Nothing then remained to be done but to arrest the debtor under the writ, unless the Court should make some fresh order. It is suggested that the sheriff ought to have abstained from executing the writ, because the person who was to be arrested gave him notice that the arrest would be illegal. The writ was perfectly regular, and the sheriff was bound to execute it. He did, in fact, at his own risk abstain for a time from doing so. The risk was perhaps not very great, as he acted upon the request of the creditors. But, if the sheriff was bound to execute the writ, nothing which the creditors did could relieve him from the obligation to do so. The company made a concession to the debtor, at the urgent entreaty of his wife, and the use which he made of their leniency was, not to pay the money, but to raise a technical objection to his arrest. In my opinion everything has been regularly done; the writ was properly issued and the debtor was properly arrested and lodged in prison, and no good ground has been shewn for his discharge.

Solicitors: *Prince & Plumbridge; Norman C. Barraclough; Palmer & Bull.*

(1) L. R. 16 Eq. 324.

W. L. C.

BOTTEN *v.* CITY AND SUBURBAN PERMANENT BUILDING SOCIETY.

STIRLING J.

1895

April 26; *May* 17.

[1894 B. 1342.]

Building Society—Instrument of Dissolution—Withdrawing Members—Priority—Variation of Rights—Building Societies Act, 1874 (37 & 38 *Vict. c.* 42), *ss.* 18, 32.

It is not competent for the members of a building society by an instrument of dissolution, executed under the Building Societies Act, 1874, to vary the rights of members under the rules of the society by a provision taking away the priority of withdrawing members over those who have given no notice of withdrawal, unless such variation has been previously sanctioned at a special meeting held under s. 18 of the Act and of the rules of the society.

Kemp v. *Wright* ([1894] 2 Ch. 462; [1895] 1 Ch. 121) considered.

THIS was a motion for an injunction to restrain the defendant society from paying its moneys except to the plaintiff and to such withdrawing members of the society as still remained unpaid in accordance with their priority; and from in any manner dealing with the moneys of the society contrary to the provisions of rule 5 of the rules of the society; and for the appointment of a receiver.

The defendant society was established in 1865 under the statute 6 & 7 Wm. 4, c. 32. On December 10, 1887, it was incorporated under the Building Societies Act, 1874 (37 & 38 Vict. c. 42).

The rules of the society provided, inter alia, as follows (rule 5): "Upon giving one month's notice in writing to the secretary of his intention so to do, any member may withdraw his investments at any monthly meeting of the society, the amount to be repaid out of the moneys received from members in repayment of advances on the night for withdrawal; but should the repayments not be sufficient, the balance shall be paid from the same fund on the next or following monthly night. If several members shall give notice to withdraw within any one month, they shall be paid pro ratâ; but the directors shall have power, after a resolution of the board, to use the monthly subscriptions

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upon investments to assist in repaying withdrawals, provided always that the widow and children of lunatic or deceased members shall have the precedence. Notices of withdrawal must be sent to the secretary three clear days before the monthly night for receipt of subscriptions." (Rule 32). "No rule herein contained, nor any rule hereafter to be made, shall be altered rescinded or repealed, unless at a general meeting of this society, convened by circular, sent to each member, signed by the secretary, stating the object of the meeting, and in pursuance of a requisition addressed to the directors, by seven or more of the members of this society; which said requisition and notice shall be publicly read at the two usual meetings of this society, to be held next before such general meeting, for the purpose of such alterations or repeal; and unless such alterations or repeal shall be made with the concurrence of three-fourths of the members of this society, then and there present no such proposed alterations shall be made."

The plaintiff was the owner of five fully paid-up shares of 50*l.* each in the defendant society. On January 20, 1891, he gave notice of withdrawal; and this notice became effective on February 20, 1891. According to rule 5, as construed by the Court of Appeal in this action, the plaintiff thereupon became entitled to be repaid the amount of his investments out of all moneys received from members in repayment of advances on and subsequent to February 20, 1891, subject to the claims of all members who had given notices which became effective before February 20, 1891, pari passu with members who gave notices which became effective on that date, and in priority to members who gave notices which became effective subsequently.

It was alleged by the plaintiff that, although there were funds in the hands of the society and its directors available for the purpose of repaying him, those funds had not been so applied; and on March 21, 1894, he commenced the present action.

Sect. 32 of the Building Societies Act, 1874, provides: "A society under this Act may terminate or be dissolved"—in various manners therein mentioned, and, amongst others, "By dissolution with the consent of three-fourths of the members, holding not less than two-thirds of the number of shares in the

society, testified by their signatures to the instrument of dissolution. The instrument of dissolution shall set forth (*a*) the liabilities and assets of the society in detail; (*b*) the number of members, and the amount standing to their credit in the books of the society; (*c*) the claims of depositors and other creditors, and the provision to be made for their payment; (*d*) the intended appropriation or division of the funds and property of the society; (*e*) the names of one or more persons to be appointed trustees for the special purpose, and their remuneration."

On February 13, 1895, an instrument of dissolution was executed in accordance with this section.

Clause 4 of that instrument provided that, after payment of the claims of depositors and other creditors, the funds and property of the society should, subject to the prior payment of costs and expenses of and incidental to the carrying into effect of the instrument of dissolution and in relation thereto, be appropriated and divided among the members thereof in the proportion of the amounts standing to each member's credit in the books of the society; and clause 15 provided, "that for the purposes of this instrument the term member shall mean and include all members of the society whether they have given notice of withdrawal or not; and members who shall have given notice of withdrawal shall have no priority over members who have not given such notice."

Previously to the execution of the instrument of dissolution, no meeting was held under the society's rule 32, or s. 18 of the Building Societies Act, 1874, sanctioning any alteration in the rights of withdrawing members under rule 5.

According to the society's statement of affairs set out in the instrument, its liabilities were mainly on investments, there being shares to the amount of about 37,270*l.*; the deposits unpaid amounted to 208*l.* 9*s.* 6*d.*; and there were some other small debts. The assets were stated to be, "Balance of principal due —35,000*l.* 1*s.* 1*d.*"; and there was a deposit at the bank of 2250*l.*; and cash at the bank, 248*l.* 17*s.* 6*d.*

It appeared from the balance-sheets of the society for the years 1891 and 1892 that in those years sums amounting to upwards of 10,310*l.* and 3071*l.* were received for principal and

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interest in respect of repayments of advances. The sums actually paid to withdrawing members in those years amounted to 2765*l.* 3*s.* 5*d.* and 1309*l.* 10*s.* 1*d.*

Hastings, Q.C., and *C. E. Bovill*, for the plaintiff. The defendants have funds in their hands available for the repayment of the plaintiff's claim, and the Court of Appeal have held that under rule 5 he is entitled to a charge on those funds though not on the general assets. The rights of members under the rules cannot be altered by an instrument of dissolution. The decision of Kekewich J. to the contrary in *Kemp* v. *Wright* (1), although it was not appealed from, cannot be relied on, having regard to what was said by Lord Herschell L.C. in the same case (on appeal upon another point): *Kemp* v. *Wright.* (2) There is no power under s. 32 of the Act of 1874 to alter the rights of members which have accrued by virtue of notice given while the society was in operation as a going concern. The rules can only be altered in the manner prescribed therein, or under s. 18 of the Act of 1874. A society of this kind cannot on the eve of dissolution alter the contract between itself and its members and distribute its funds otherwise than in accordance with the rules.

Buckley, Q.C., and *Montague Lush*, for the defendants. The rules have been validly altered by the deed.

The decision of the Court of Appeal in *Kemp* v. *Wright* (2) does not apply to this case.

It was not the rights of members as to priority of repayment which were there in question, but their liabilities as creditors. The decision of Kekewich J. is, however, exactly in point.

A member who has given notice of withdrawal is still a member: *Sibun* v. *Pearce.* (3)

In *Bradbury* v. *Wild* (4) it was held that a mortgagor to a building society was bound by the rules as altered after the date of the contract. The rights of the plaintiff as a withdrawing member are subject to the power to alter the rules: *Pepe* v. *City and Suburban Permanent Building Society.* (5) Rule 5 only

(1) [1894] 2 Ch. 462.
(2) [1895] 1 Ch. 121.
(3) 44 Ch. D. 354.
(4) [1893] 1 Ch. 377.
(5) [1893] 2 Ch. 311.

gives the right of repayment to a withdrawing member while the company is a going concern: *In re Mutual Society.* (1)

Hastings, Q.C., in reply. *In re Mutual Society* (1) is dealt with in *In re Alliance Society.* (2)

STIRLING J. (after stating the facts). Primâ facie it would seem, in the absence of explanation, that there ought to be in the coffers of the defendant society funds applicable towards satisfaction of the plaintiff's claim; and if the society had been ordered to be wound up the right of the plaintiff to have the funds so applied would not have been affected. (See *Walton* v. *Edge* (3); *In re Alliance Society.* (2)) It is, however, contended that any rights of the plaintiff are put an end to by the instrument of dissolution; and in support of this proposition the case of *Kemp* v. *Wright* (4) is relied on.

In that case two points were decided. The head-note as to the first point is this: "It is competent for the members of a building society by an instrument of dissolution under s. 32 of the Building Societies Act, 1874, to vary the rights of members under the rules by a provision in the instrument that members who have given notice of withdrawal shall have no preference or priority over members who have not given such notice." The second point decided was this: "Upon such an instrument taking effect it was held that advanced members could be compelled to pay up forthwith the balances due from them on their securities." With regard to the first point, the material portion of the judgment of Kekewich J. is as follows (5): "The legislature provides for dissolution in an entirely different way: 'By dissolution with the consent of three-fourths of the members, holding not less than two-thirds of the number of shares in the society, testified by their signatures to the instrument of dissolution.' That is an addition to dissolution according to the rules. In other words, as it seems to me, the legislature has said in effect: 'And every society shall for this purpose have a rule incapable of alteration, that if members, not being less

(1) 24 Ch. D. 425, n.
(2) 28 Ch. D. 559.
(3) 10 App. Cas. 33.
(4) [1894] 2 Ch. 462.
(5) [1894] 2 Ch. 470.

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than three-fourths of the whole number and holding not less than two-thirds of the number of shares, shall consent to a dissolution, such consent being testified by their signatures, then the society shall be dissolved notwithstanding that the written or private rules of the society do not provide for any such event.' The terms of the sub-section seem to me, I must not say substituted for the rules, but added to them, as a necessary adjunct which is henceforward to be found in every set of rules, implied by legistive enactment. It is not denied that if the variation of the rights of members which is now objected to had been effected under the rules, it would have been sound, and no complaint could have been made. Why, then, should it not be capable of being done under legislative enactments such as I have mentioned?"

That judgment appears to be based on two propositions: (1.) that what was done in *Kemp* v. *Wright* (1) could have been validly done by an alteration of the rules; and (2.) that this being so, it could be done with equal efficiency by an instrument of dissolution under s. 32 of the Building Societies Act, 1874.

In principle, these propositions cover the present case; and if the matter had rested there, I should have thought it right to follow the decision, even though I might have doubted whether I should myself have arrived at the same conclusion.

As to the former of these propositions, the decisions as to the effect of an alteration in rules certainly go far: see for example *Pepe* v. *City and Suburban Permanent Building Society.* (2) It is said, however, that the second of these propositions is inconsistent with what is laid down by the Lord Chancellor on appeal in the same case of *Kemp* v. *Wright.* (3) That appeal was directed, not to the first of the two points decided in the Court below, but to the second. In the course of giving judgment, however, the Lord Chancellor saw fit to examine and comment upon the provisions as to dissolution. His Lordship (4) says: "By s. 32 of the Act of 1874 the dissolution of a society may take place with the consent of three-fourths of the members, holding not less than two-thirds of the number of shares in the society. By such

(1) [1894] 2 Ch. 462.
(2) [1893] 2 Ch. 311.
(3) [1895] 1 Ch. 121.
(4) Ibid. 124.

consent a society may be dissolved against the will of the minority. In this case, the requisite majority have agreed to the dissolution of the society. That was purely a matter for the shareholders—a matter in which the majority of the members could bind the minority. What they can bind them to is a dissolution. The instrument of dissolution is to set forth certain matters mentioned in s. 32, sub-s. 3. There is no provision further than that for determining the rights of members on a dissolution, and no enactment that their rights should be other than those they enjoy under the rules of the society which created the contract between the members."

Now, having examined this judgment as carefully as I can, it does seem to me that this last sentence expresses an opinion as to the effect of an instrument of dissolution different from that taken in the Court below: at all events, it affords an answer to the question with which the judgment concludes. I refer to the following passage (1): "It is not denied that if the variation of the rights of members which is now objected to had been effected under the rules, it would have been sound, and no complaint could have been made. Why, then, should it not be capable of being done under legislative enactments such as I have mentioned?"

The answer is, in the language of the Lord Chancellor, that there is no enactment that the rights of members on dissolution should be "other than those they enjoy under the rules of the society which created the contract between the members"; and I wish to point out that there may be substantial reason why this should be so. The statutory enactment as to alteration of the rules is to be found in s. 18 of the Act of 1874. That section provides that, "Any society under this Act, certified previously to the passing of this Act, may alter or rescind any rule or make any additional rule by the vote of three-fourths of the members present at a special meeting called for the purpose, of which meeting notice, specifying the proposed alteration, rescission, or addition shall be given to the members in the manner provided by the rules of the society, or in the absence of such rules, by letters sent through the post

(1) [1894] 2 Ch. 470.

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seven days previous to such meeting; and any society hereafter established may alter or rescind any rule, or make an additional rule, in the manner its rules direct."

Whichever branch of this section applies, the alteration is to be made with the sanction of a meeting of which notice has been given in the manner provided by the rules of the society. No such meeting has been held.

On the other hand, as regards an instrument of dissolution, it need not be considered by a meeting at all. All that the Act requires is that a dissolution should be "with the consent of three-fourths of the members, holding not less than two-thirds of the number of shares in the society, testified by their signatures to the instrument of dissolution." The Courts have at all times attached importance to the due observance of rules relating to general meetings, at which any shareholder affected may express his views; and if there is one case more than another in which such rules ought to be rigidly followed, it would seem to be where vested rights of a shareholder or class of shareholders are sought to be taken away by an alteration of an existing rule. In such case I think that alterations in rules ought only to be held binding when made modo et formâ as prescribed by the legislature.

Now, if the proposition contended for by the defendants were well founded, then in a case where a small number of members had given notices of withdrawal so as to exhaust the funds of the society, it would be possible for the remaining members, without even hearing their fellow shareholders, to deprive them of the advantage they had gained and of the fruits of their diligence. I cannot think that this was intended; and I come to the conclusion that the defendants by acting on the instrument of dissolution will improperly interfere with the rights of the plaintiff, and that there ought to be an injunction to restrain them from so doing.

Solicitors: *Piesse & Son; Skipper & Tucker.*

G. A. S.

KEKEWICH J.
1895
May 2, 3.

In re SOMERS-COCKS. WEGG-PROSSER *v.* WEGG-PROSSER.

[1895 S. 916.]

Will—Residuary Gift—Charity—Marshalling—Exception of Impure Personalty—Intestacy.

A testatrix bequeathed her personal estate to trustees upon trust for sale, and out of the proceeds to pay her testamentary expenses and debts, and then to pay a legacy to her niece: and the residue of her personal estate, save and except such parts thereof as could not by law be appropriated by will to charitable purposes, she bequeathed to a charity:—

Held, that the residuary bequest did not operate as a direction to marshal the assets in favour of the charity, but that the personal estate, after payment of the testamentary expenses and debts and the legacy out of the pure and impure personalty rateably, passed, as to so much of the residue as consisted of impure personalty, to the next of kin as undisposed of.

Lady Emily Maria Somers-Cocks, by her will, dated November 14, 1876, bequeathed all her personal estate to two trustees, whom she also appointed her executors, and directed that they should stand possessed of all her said personal estate upon trust to sell the same, and should out of the moneys produced by such sale, and with and out of such part of her personal estate as should consist of money, pay her testamentary expenses and debts; and after payment of her testamentary expenses and debts she directed her trustees to raise the sum of 14,000*l.* and pay the same to her niece, Isabella Caroline Somerset, for her separate use absolutely, subject to the payment of certain annuities. And after devising to her trustees her trust and mortgage estates, she proceeded as follows: "All the rest and remainder of my personal estate whatsoever and wheresoever situate, save and except such parts thereof as cannot by law be appropriated by will to charitable purposes, I give and bequeath to the Society of St. Margaret's, East Grinstead, and I direct my executors and trustees to pay and transfer the same to the mother superior for the time being of the said society for its use."

The testatrix died on August 5, 1879, leaving considerable

KEKEWICH J. 1895 *In re* SOMERS-COCKS. WEGG-PROSSER *v.* WEGG-PROSSER.

personal estate, but no real estate. Her personal estate, which consisted partly of pure personalty and partly of money invested on mortgage of real estate, was far more than sufficient for the payment of her testamentary expenses and debts and the legacy of 14,000*l.* In 1894, upon her estate becoming entitled, through the death of a sister, to additional personal estate made up of pure and impure personalty, the question was raised as to the effect of the residuary bequest—whether it operated as a direction to marshal the assets of the testatrix in favour of the charity, so as to throw the testamentary expenses and debts and the legacy of 14,000*l.*, primarily upon the impure personalty, and thus leave a larger portion of pure personalty for the charity; or whether the residue of the estate, after payment of the testamentary expenses and debts and the legacy, passed, as to so much as consisted of impure personalty, to the legal personal representatives of the three next of kin (all deceased) of the testatrix as undisposed of. This summons was accordingly taken out by the sole surviving trustee and executor of the testatrix against the legal personal representatives of her next of kin, and the mother superior of the Society of St. Margaret's, to have it determined whether the residuary bequest operated as a direction to marshal the assets in favour of the charity.

George Lawrence, for the plaintiff.

Marten, Q.C., and *George Lawrence*, for the defendants, the legal personal representatives of two of the next of kin. Our contention is that no marshalling is directed by the will, and that after payment of the testamentary expenses, debts and legacy, so much of the estate as consisted of impure personalty is, by reason of the exception in the residuary gift, undisposed of, and belongs to the next of kin. The case is precisely covered by *Edwards* v. *Hall*. (1) On appeal (2) the point was not raised.

[They were stopped by the Court.]

T. H. Carson, for the defendant, the legal personal representative of the third next of kin.

Renshaw, Q.C., and *Hornell*, for the defendant, the mother superior of the charity. There is no intestacy. Upon the con-

(1) 11 Hare, 1, 22. (2) 6 D. M. & G. 74.

struction of the will we contend that the testatrix intended to marshal her estate so as to throw the testamentary expenses, debts, and legacy primarily upon the impure personalty, leaving the pure personalty for the charity. Her intention clearly is to give what she can give—that is, her pure personalty—to the charity, and the rest for the other purposes specified. *Edwards* v. *Hall* (1) is distinguishable, for there the testatrix expressly elected to die intestate.

The case is really governed by *Wills* v. *Bourne* (2), *Miles* v. *Harrison* (3), and *In re Arnold.* (4)

KEKEWICH J. "Marshalling" is the application of an equity which the Court finds in favour of a person entitled to be paid out of one fund only, as against a person who is entitled to be paid out of two funds. The Court holds that, where there is that state of facts, it is not fair—not according to conscience—that the person who is entitled to be paid out of two funds should come first upon the one fund out of which alone the other person is entitled to be paid. When you find a gift to a charity in a will (of course we are now dealing with the case of wills before the recent legislation) you are not allowed to apply that equity in favour of the charity, because the result would be, practically, to give the charity what the law says the charity shall not have. Therefore, the old rule always was that you may not marshal in favour of a charity. But the doctrine is sought to be applied so as to give effect to the directions of the testatrix in this case. It is said that the testatrix has directed marshalling, and that the assets must be marshalled according to that direction, and so forth. Whether the testatrix has, so to speak, marshalled her assets in favour of the charity or not, is a mere question of construction. [His Lordship then read and commented on the clauses in the will, and continued:—]

On the question of construction, reading the residuary gift literally, apart from authority, it seems to me that the testatrix has said plainly, "I now come to divide what is left, after paying my testamentary expenses and debts, and after

(1) 11 Hare, 1.
(2) L. R. 16 Eq. 487, 489.
(3) L. R. 9 Ch. 316, 322.
(4) 37 Ch. D. 637, 642–3.

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providing for the legacy; and what is left I give, with one exception — that is, except what I cannot properly give to charity—to this particular society." Then, in order to arrive at the residue according to the proper and ordinary course of administration, you must take the values of the pure and impure personalty as at the date of the death, and put the pure personalty into one class and the impure into another, and then you must pay the testamentary expenses and debts out of the two classes in rateable proportions, and what is left will partly belong to the charity and partly not: in other words, the charity will take the portion of pure personalty that is left, but will lose what is left of the impure personalty.

But there are some authorities which must not be passed over in the consideration of this case. Mr. Marten relied on *Edwards* v. *Hall* (1), decided by Wood V.C. It appears to me that what the Vice-Chancellor said in that part of his judgment dealing with this point (2) is appropriate here, and indeed is almost, though not quite, on all fours. These are the Vice-Chancellor's words: "She" (the testatrix) "says, 'Let the one go to the charitable bequest, and the other to persons whom I may name.' In truth, she did not name them." That seems to me exactly the case here. This testatrix says: "Let one part of my residue—that which is not the excepted part—go to the charity, and let the excepted part go to some one else"; but she does not specify to whom.

Then, on the other hand, there are three cases cited. The first is *Wills* v. *Bourne* (3), which is Lord Selborne's decision. That case seems to me to be very different indeed from the case I have here, and also very different from *Edwards* v. *Hall.* (1) The will there seems to me to give directions for marshalling (using the term in the sense in which I used it just now) tolerably clearly. The testator declared "that only such part or parts of his estate and premises should be comprised in the residue thereof, and be so divided, paid, or transferred as aforesaid, as might by law be given or bequeathed for charitable purposes." That direction seems to me to run very much in the form

(1) 11 Hare, 1. (2) 11 Hare, 22.
(3) L. R. 16 Eq. 487.

commonly used in wills, and therefore it cannot be considered as touching the point in this case. The application of that case to the present rests upon what was said by Mellish L.J. about it in *Miles* v. *Harrison*. (1) He says (2) that the will in the case before him and the will in *Wills* v. *Bourne* (3) were substantially the same if you struck out from the will in *Miles* v. *Harrison* (1) the words "and which shall be reserved by my trustees or trustee for the time being for that purpose." That gives, no doubt, with reference to the present case, a force to *Wills* v. *Bourne* (3) which it would not otherwise have had. But even if you strike out from the will in *Miles* v. *Harrison* (1) the words I have mentioned, you still have a direction there that certain legacies "shall respectively be paid and satisfied out of such part of my personal estate as can lawfully be applied to the payment thereof"; and those words might very well be construed, as they were construed, as giving a direction for marshalling. But here we have not got those words: instead of there being a direction to marshal, all we have is an exception of some part of the residue given to charity.

The same remark applies to the case of *In re Arnold*. (4) There the words were entirely different; they were perhaps even more according to common form than in either of the other two cases. They were: "I direct that the foregoing charitable legacies shall be paid exclusively out of such part of my pure personal estate as is legally applicable for that purpose." I apprehend that what the other cases really decided on this point was, that the language of the wills there under consideration was equivalent to the language used in the will in *In re Arnold*. (4)

As I understand the cases, the Court finds words to which effect must be given, and says: "We cannot give full effect to that except by the process of marshalling, and therefore you must marshal." The reason for the Court so deciding is, not because the testator has directed marshalling, but because marshalling is the only way by which the direction the testator has given can be carried into effect.

(1) L. R. 9 Ch. 316.
(2) Ibid. 322.
(3) L. R. 16 Eq. 487.
(4) 37 Ch. D. 637.

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Here, I repeat, it seems to me that you can give full effect to what the testatrix has directed without any marshalling at all; nay more, my own opinion is that you would not be giving effect to that direction in the will if you did marshal. I think you would be doing just what the testatrix says is not to be done. She has said that her personal estate, after payment of her debts and testamentary expenses and one legacy, is to be dealt with as she directs, with an exception which she specifies. The property comprised in that exception is undisposed of, and therefore there is an intestacy as to it, and there must be a declaration accordingly.

All the costs of the summons will come out of the estate.

Solicitors: *Witham, Roskell & Co.; Leefe & Leefe; Hulberts & Hussey.*

G. I. F. C.

KEKEWICH J. 1895 *May* 29.

THOMSON *v.* TRUSTEES, EXECUTORS, AND SECURITIES INSURANCE CORPORATION.

[1895 T. 787.]

Limited Company—Assets—Investment—Surrender of Part to Improve Value of Remainder—Ultra vires—Reduction of Capital—Companies Acts, 1867 *and* 1877 (30 *&* 31 *Vict. c.* 131; 40 *&* 41 *Vict. c.* 26).

A limited company, having power to invest its capital, and acting within the scope of its business as described in its memorandum of association, is at liberty to surrender part of a particular investment with a view to improving the remainder; and such a surrender is not a "reduction of capital" within the Companies Acts, 1867 and 1877.

Thus, where a limited financial corporation, holding shares in a railway company whose shares had become valueless through inability to complete its line for want of sufficient capital, proposed, as part of a scheme for raising further capital, to surrender some of their shares, and so, by assisting to promote the completion of the line, to give a substantial value to their remaining shares:—

Held, that this was not a "reduction of capital" requiring the sanction of the Court under the above Acts.

THE defendants, the Trustees, Executors, and Securities Insurance Corporation, Limited, were incorporated in 1887, under the Companies Acts, 1862 to 1886, with a nominal capital of

2,000,000*l.* in 200,000 shares of 10*l.* each. Their objects, as detailed in the memorandum of association, were of the most comprehensive character, including receiving money on deposit, making loans upon any security, "and generally to lend money on such terms as may seem expedient, and carry on financial operations of every kind"; borrowing money on mortgage and other securities, investing money in such manner as might from time to time be determined; managing, disposing of, or otherwise dealing with all or any part of the property of the company; and doing all such things as were incidental or conducive to the attainment of the above objects.

The corporation were the holders of 6325 fully paid-up shares of 5*l.* each in a railway company, called the Corunna, Santiago, and Peninsular Railway Company, Limited—a company formed for constructing a railway in Spain under a concession granted by the Spanish Government.

By an agreement dated May 14, 1895, and made between the corporation of the one part, and the railway company of the other part: after reciting that the company had no funds wherewith to complete its line, that its shares were unmarketable and had no appreciable value, that it was in danger of losing its concession and forfeiting the deposit it had lodged with the Spanish Government on obtaining the concession, and that it was unable at present to raise any further capital, but that a scheme, to the effect therein specified, for raising the amount required for completing the line had been proposed, part of the scheme being that a sum of money should be borrowed from a bank on the guarantees of persons approved by the bank, and that, as a consideration for giving the guarantee, the guarantors should have transferred to them by the shareholders, in proportion to their holdings, part of the issued share capital of the company: It was agreed that the corporation, on being satisfied that the scheme had become binding upon all parties necessary to give effect to it, would, at the request of the company, contribute and transfer, as the company might direct, for the purpose of carrying out the scheme, 2000 shares of the nominal value of 10,000*l.*, being part of the 6325 shares held by the corporation. The writ in this action was then issued on May 23, 1895, by the

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plaintiff, a shareholder in the corporation, on behalf of himself and all other shareholders, against the corporation, claiming a declaration that the agreement was ultra vires, and an injunction to restrain the corporation from carrying it into effect.

This was followed by a notice of motion by the plaintiff for an injunction to restrain the corporation from transferring the 2000 shares under the agreement, on the ground that the transfer was to be made without the corporation obtaining any benefit or return therefrom, and that the agreement amounted to a surrender of part of the assets of the corporation, and was ultra vires.

An affidavit filed by the general manager of the corporation, in opposition to the motion, stated that the object of the agreement was to assist the railway company in completing their line and thus to improve their position, the result of which would be to give the remaining 4325 shares held by the corporation an appreciable and substantial value: also that the proposed scheme would in all probability fall through unless the agreement were carried into effect.

The chairman of the railway company also deposed to the disastrous results which would ensue to the company if the scheme were to fall through and the company's line remain uncompleted.

The motion now came on for hearing and was, by consent, treated as the trial of the action.

E. B. Cooper, for the plaintiff. This is a proposal to reduce the capital of the corporation in the sense of surrendering part of their assets; and s. 9 of the Companies Act, 1867, is precise, that no such reduction shall be made without an order of the Court obtained in the manner prescribed by the Act. The meaning of the word "capital" in that Act is extended by s. 3 of the Companies Act, 1877. The proposed surrender is not sanctioned by the memorandum and is ultra vires.

Renshaw, Q.C., and *A. R. Kirby*, for the defendant corporation. This is a financial company; and a company of this kind is entitled, from its very nature, to do whatever will, in its judgment, have the effect of protecting its assets. Moreover, the memorandum itself is sufficiently wide to enable the corporation

to carry out this scheme, which will be very greatly to their advantage, for it will enable them to make a profit instead of a loss out of their holding in the railway company. This is, in fact, a mode of carrying on the business of the corporation with which the Court will not interfere: *Taunton* v. *Royal Insurance Co.* (1)

KEKEWICH J. It seems to me that what is proposed to be done by the corporation cannot be said to be a reduction of capital; and, if it is not a reduction of capital, it clearly comes within their powers. No doubt, the legislature is extremely jealous of anything like a reduction of capital. By the very strict rules which have been enacted, the legislature has shewn that capital is not to be reduced except by following those rules; but they were never intended to paralyze the ordinary business of a limited company; and there must be some elasticity in construing them with reference to the ordinary business of such a company. It seems to me that, if I were to hold this to be a reduction of capital, I should be obliged to say that whenever a company parts with any assets, whether held as an investment or as a security, the capital is reduced. In one sense it is, but not in the sense in which you really reduce the capital—that is the trading capital—of a corporation. Take this illustration. A company is allowed to invest money on mortgage of land: it invests, say, 10,000*l.* on mortgage of land: the land unfortunately becomes depreciated, and not lettable, and the company is not realizing a benefit from its mortgage, and is not likely to do so. The mortgagor says, "If you will only release a few acres here, I think I should lay out some roads, and so forth, and the result will be that in the course of a few years the estate, which would still remain subject to your security, will be very much improved." The company think it may be only an off-chance but still it is worth trying: they honestly think that by giving up some part of their security they may gain a benefit. To say that is a reduction of capital, which cannot be sanctioned without coming to the Court on a petition and writing the words "and reduced," seems too extravagant: yet that is on precisely the

(1) 2 H. & M. 135.

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same lines as this case. This is, in a sense, an investment or security which the company has as part of its assets. Its assets are employed in its business. This being a financial company, I think it has power to do what it thinks right in order to advance its interests within what ordinary men would call their ordinary business. This motion being treated as the trial of the action, I give judgment for the defendants; and the judgment should be prefaced with the words, "The Court being of opinion that there is nothing to prevent the defendant company from entering into and carrying out the agreement of May 14, 1895."

The plaintiff must pay the costs of the action.

Solicitors: *Ashurst, Morris, Crisp & Co.; Slaughter & May.*

G. I. F. C.

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LORD KENLIS *v.* HODGSON.

[1870 K. 10.]

Revenue—Legacy Duty—Personal Estate directed to be laid out in Land—Tenant for Life—Reversion of Legatee on his own Death—Defeasible Interest—"Began to enjoy benefit"—Legacy Duty Act, 1796 (36 *Geo.* 3, *c.* 52), *ss.* 12, 19—*Customs and Inland Revenue Act*, 1881 (44 *&* 45 *Vict. c.* 12), *s.* 41.

T., who died in 1854, devised his real estate, in the events which happened, to the use of B. for life, with remainder to the use of his first and other sons in tail male, with remainder to the use of B. in fee: and the testator bequeathed his residuary personal estate to trustees in trust for sale and to invest the proceeds in the purchase of land to be settled to the like uses, the income of the proceeds until such investment being payable in the same manner as the rents and profits of the land when purchased. In 1864 B. became tenant for life, and legacy duty was paid at 1 per cent. on his life interest in the residuary personal estate not invested in the purchase of land. In 1893 B. died without male issue, having by his will declared that all money liable to be laid out in land under T.'s will, and to which he, B., should be absolutely entitled in default of male issue, should be considered as part of his personal estate.

Under the Customs and Inland Revenue Act, 1881, B.'s executors paid affidavit duty at 3 per cent. on his personal estate (including the residuary personal estate subject to the trusts of T.'s will and not yet laid out in land), after deduction for B.'s debts:—

Held, that, at the moment of his death without male issue, B. "began to enjoy the benefit" of the capital of T.'s then subsisting residuary personal estate, within the meaning of s. 12 of the Legacy Duty Act,

36 Geo. 3, c. 52; and that, therefore, on his death legacy duty at 1 per cent. became, by that section and s. 19, payable under T.'s will on such capital, notwithstanding the affidavit duty already paid on B.'s estate.

In re Haygarth's Trusts (22 Ch. D. 545) distinguished.

PETITION.

Alderman William Thompson, by his will dated in 1853, devised his real estate in Westmoreland (in the events which happened) to the use of his wife for life, with remainder to the use of his daughter Amelia, Countess of Bective, for life, with remainder to the use of Lord Kenlis (the only son of the Countess) for life, with remainder to the use of his first and other sons successively in tail male, with remainder to the use of Lord Kenlis in tail general, with divers remainders over. And the testator bequeathed his residuary personal estate to trustees upon trust for sale and conversion, and, until the proceeds should be invested in the purchase of land as thereafter mentioned, to apply the income in the same manner as the rents and profits of the real estate to be purchased as thereinafter directed would be applicable if such purchase had been actually made. And he directed that his trustees should, in their discretion, invest two-thirds of the proceeds of his residuary personal estate in the purchase of land to be settled upon the same uses as were thereinbefore limited after the decease of his said wife and daughter concerning his said real estate in Westmoreland. The testator died in 1854, his widow in 1861, and his daughter, the Countess, in 1864. Lord Kenlis attained twenty-one on February 11, 1865, and by deeds executed in April, 1865, and in 1869, he barred his estate tail in remainder in the real estate settled by the will and in the residuary personal estate thereby directed to be invested in the purchase of land.

Probate duty under 55 Geo. 3, c. 184, was paid on the personal estate of the testator, but no affidavit duty, inasmuch as that duty was not imposed on the estate of deceased persons until the Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12)—that is, long after the testator's death. Legacy duty at the rate of 1 per cent. on the life interest of Lord Kenlis in the residuary personal estate not invested in the purchase of land was paid after he attained twenty-one, but legacy duty on the capital of

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the residuary personal estate was not paid, no person being at that time absolutely entitled thereto.

By his will dated January 24, 1892, Lord Kenlis, then Earl of Bective, appointed executors and made various bequests, and declared that all money which should be liable to be laid out in land under the trusts of the will of Alderman Thompson, and to which he, the Earl, should be absolutely entitled in default of his having male issue, should be considered as part of his personal estate.

The Earl died on December 15, 1893, and on February 9, 1894, his executors paid affidavit duty on his personal estate under the Customs and Inland Revenue Act, 1881, at the rate of 3 per cent. on the net value, after deducting debts and funeral expenses pursuant to s. 28.

The particulars of such personal estate included all the residuary personal estate which, at the Earl's death, was subject to the trusts of Alderman Thompson's will and not yet invested in the purchase of land.

The question then arose whether, on the Earl's death, the Crown became entitled to legacy duty, under Alderman Thompson's will, at 1 per cent. "in respect of the Earl's succession on his (the Earl's) death" to the residuary personal estate of Alderman Thompson which, at the Earl's death, had not been invested in the purchase of land.

To have this question decided, this petition was presented by the Earl's executors in the above action, which was commenced in 1870 for the administration of Alderman Thompson's estate.

Warmington, Q.C., and *Leverson*, for the petitioners. The Crown claims that the Earl of Bective became liable to pay, and that his estate is now liable to pay, legacy duty on the whole of the corpus of the residuary personal estate of the testator, Alderman Thompson, on the ground that the Earl was, at the moment of his death, entitled to that corpus. The question turns on s. 12 of the Legacy Duty Act, 36 Geo. 3, c. 52, which section is by s. 19 (1) made applicable to personal estate directed

(1) Sect. 12 of 36 Geo. 3, c. 52, is as follows: "And be it further enacted, That the duty payable on a legacy or residue, or part of residue,

to be applied in the purchase of land. The Crown contends that the Earl received the corpus of this residuary personal

of any personal estate, given to or for the benefit of, or so that the same shall be enjoyed by different persons in succession, who shall be chargeable with the duties hereby imposed at one and the same rate, shall be charged upon and paid out of the legacy or residue, or part of residue, so given, as in the case of a legacy to one person; and where any legacy or residue, or part of residue, shall be given to or for the benefit of, or so that the same shall be enjoyed by different persons in succession, some or one of whom shall be chargeable with no duty, or some of whom shall be chargeable with different rates of duty, so that one rate of duty cannot be immediately charged thereon, all persons who, under or in consequence of any such bequest, shall be entitled for life only, or any other temporary interest, shall be chargeable with the duty in respect of such bequest, in the same manner as if the annual produce thereof had been given by way of annuity; and such persons respectively shall be so chargeable with such duty, and the same shall be payable when they shall respectively become entitled to and begin to receive such produce, and shall be paid by equal portions during the aforesaid term of four years, if they shall so long continue to receive such produce; and where any other partial interest shall be given, or shall arise out of such property so to be enjoyed in succession, the duty on such partial interest shall be charged and paid in the same manner as the duty is hereinbefore directed to be charged and paid in like cases of partial interests, charged on any property given, otherwise than to different persons in succession; and all and every person and persons who shall become absolutely entitled to any such legacy or residue, or part of residue, so to be enjoyed in succession, shall, when and as such person or persons respectively shall receive the same, or begin to enjoy the benefit thereof, be chargeable with and pay the duty for the same, or such part thereof as shall be so received, or of which the benefit shall be so enjoyed, in the same manner as if the same had come to such person or persons immediately on the death of the person by whom such property shall have been given to be enjoyed, or in such manner that the same shall be enjoyed in succession."

Sect. 19 is as follows: "And be it further enacted, That any sum of money or personal estate, directed to be applied in the purchase of real estate, shall be charged with and pay duty as personal estate; unless the same shall be so given as to be enjoyed by different persons in succession, and then each person entitled thereto in succession, shall pay duty for the same in the same manner as if the same had not been directed to be applied in the purchase of real estate, unless the same shall have been actually applied in the purchase of real estate before such duty accrued; but no duty shall accrue in respect thereof, after the same shall have been actually applied in the purchase of real estate, for so much thereof as shall have been so applied: Provided nevertheless, that in case before the same or some part thereof shall be actually so applied, any person or persons shall become entitled to an estate of inheritance in possession in the real estate to be purchased therewith, or with so

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estate, or "began to enjoy the benefit thereof," within the meaning of s. 12: but we submit he did not, for, as long as he was alive, the remainder to him in fee could not take effect at all, that remainder taking effect only on his actual death without issue. The section must refer to enjoyment, in the sense of actual possession, during lifetime, and upon the "benefit" that the Earl "enjoyed" he has already paid duty at 1 per cent., and his estate has also paid affidavit duty at 3 per cent. on this residuary personal estate as part of his own personal estate: accordingly his estate is exempted from further duty by s. 41 (1) of the Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12): *In re Haygarth's Trusts.* (2)

The claim of the Crown leads to this singular result, that a man in the position of the Earl under this will, who has never enjoyed the estate, in the sense of possession, beyond a life interest, pays two duties: first, the duty on his life interest, which is all the enjoyment he has had, and then a second duty at the moment of his death. *Attorney-General* v. *Robertson* (3) is distinguishable, for there the wife's life estate was held to be enlarged into an immediate absolute estate through the dropping of her husband's life estate that had intervened between her own life estate and her estate in remainder. Neither can the Crown recover duty under the Succession Duty Act, 1853 (16 & 17 Vict.

much thereof as shall not have been applied in the purchase of real estate, the same duty which ought to be paid by such person or persons, if absolutely entitled thereto as personal estate by virtue of any bequest thereof as such, shall be charged on such person or persons, and raised and paid out of the fund remaining to be applied in such purchase."

(1) Sect. 41 of the Customs and Inland Revenue Act, 1881, is as follows:—

"In respect of any legacy, residue, or share of residue payable out of, or consisting of any estate or effects according to the value whereof duty shall have been paid on the affidavit or inventory or account, in conformity with this Act, the duty at the rate of one pound per centum imposed by the Act of the fifty-fifth year of King George the Third, chapter one hundred and eighty-four shall not be payable;

"And in respect of any succession to property according to the value whereof duty shall have been paid on the affidavit or inventory or account in conformity with this Act, the duty at the rate of one pound per centum imposed by the Succession Duty Act, 1853, shall not be payable."

(2) 22 Ch. D. 545.

(3) [1892] 2 Q. B. 694; [1893] 1 Q. B. 293.

c. 51), for double duty is not payable: *Re Chapman's Trusts* (1); *Attorney-General* v. *Littledale.* (2) If duty is payable, then there ought to be an allowance for the duty paid upon the Earl's life interest, for it cannot be right that he should pay more because his interest is split up into a life interest and a remainder which never takes effect until his death.

Vaughan Hawkins, for the Crown. The Crown claims legacy duty on the capital of Alderman Thompson's residuary personal estate, the liability to that duty arising under his will. That liability did not arise until Lord Bective's death. *In re Haygarth's Trusts* (3) has no application, for that case relates not to legacy duty, but to succession duty under the latter part of s. 41 of the Customs and Inland Revenue Act, 1881, to which different considerations apply. Probate duty and legacy duty are both duties on transmission of interest, whereas succession duty is a duty upon a change of possession, where, as it has been said, death is the "signal" for property going over. It is argued on behalf of the petitioners that Lord Bective never lived to come into possession of this reversion, because it is a reversion on his own death, and therefore the estate is not chargeable with duty upon it: but it is now well-settled law that, under s. 6 of the Legacy Duty Act, 36 Geo. 3, c. 52, the duty is payable under the will or intestacy of every person for the benefit of whose estate the legacy or residue is liable to be retained, notwithstanding that such person may not himself have lived to come into the receipt or beneficial enjoyment of the property: Hanson (3rd ed. p. 51); *Attorney-General* v. *Malkin* (4); *Attorney-General* v. *Cleave.* (5) Whether the duty is payable under s. 12 or under s. 19 of the Act, is immaterial: the broad fact is that legacy duty is payable on all the residuary personal estate not laid out in land: *Macfarlane* v. *Lord Advocate.* (6) With regard to the effect of s. 41 of the Act of 1881, it is true that the petitioners, by paying affidavit duty at 3 per cent., get off legacy duty at 1 per cent. under the first part of the section: that is, supposing the 1 per cent. legacy duty would otherwise be payable under Lord

(1) 2 H. & M. 447.
(2) L. R. 5 H. L. 290.
(3) 22 Ch. D. 545.
(4) 2 Ph. 64.
(5) 31 L. T. (N.S.) 86.
(6) [1894] A. C. 291.

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Bective's will. But the 1 per cent. now claimed is payable, not under that will, but under Alderman Thompson's will. The allowance of the 1 per cent. duty can only be made to the same estate as pays the 3 per cent. duty. That construction of the section is consistent with Bacon V.-C.'s decision in *In re Haygarth's Trusts* (1), though there he was dealing with the second branch of s. 41, relating to succession duty. Accordingly, if Alderman Thompson had died since 1881, his estate would have had to pay 3 per cent. affidavit duty, and under s. 41 of the Act of 1881, that would have covered the 1 per cent. already paid. As to giving credit for the duty on Lord Bective's life interest, no deduction can be made in respect of it, for the duty is payable upon the capital, with all accretions, existing at the date of the residuary account: *Attorney-General* v. *Cavendish* (2); Hanson (3rd ed. p. 76).

Leverson, in reply.

KEKEWICH J. I understand that this personal property, devoted to the purchase of land but still personal property, was held, in an event which happened under Alderman Thompson's will, upon trusts for certain persons successively for life, the last life tenant being Lord Bective, with remainder, in the event which has happened, to Lord Bective himself absolutely, though that was not a remainder which he could personally enjoy in the sense of receiving the personal property, or calling upon the trustees to make it over to him, because there was an intervening interest in favour of his children, and the possibility of issue could not be extinct during his life; so that it could not be ascertained until the moment of his death—and in truth, if he left a widow, until after the usual period of gestation—whether there was any child who might claim the property by virtue of that intervening limitation.

Then I further understand that all the duty payable in respect of Alderman Thompson's estate was paid up to and including Lord Bective's life interest, but that nothing more was paid; it being strictly according to the provisions of the statute, and to the practice dictated by reasonable convenience,

(1) 22 Ch. D. 545. (2) Wight. 82.

that the duty is only paid by those who enjoy, and that those having only partial interests are not called upon to pay the duty in respect of the interest which may fall to others after the cesser of their own.

The question now is whether, under the Legacy Duty Act, 36 Geo. 3, c. 52, duty in respect of the ultimate remainder can be properly claimed by the Crown or not. If the petitioners are right, the result would be that the Crown never have had and never will have the whole duty chargeable by the statute in respect of Alderman Thompson's estate; that the Crown will never receive anything more than the duty in respect of the life interest, and will never receive any duty in respect of the absolute interest in remainder. That may be, of course, the result of the statute, but it is not the result one would expect to follow from a statute which imposes a duty on the estate, though, for the convenience of the subject, providing that that duty shall only be paid as the interest comes into possession.

The argument on behalf of the applicants is that Lord Bective's interest was never enjoyed in possession at all. I have already pointed out that that must be so in the sense that he could not call upon the trustees to make over the money to him, and never could give a discharge for it; and, more than that, it cannot be his in the sense that he could make it an effectual security on which to raise money, because he might have been defeated at any moment by the birth of a son. But it seems to me that to hold that this exempted the estate from duty would be giving too rigid a construction to the words of the statute. Take, for instance, the words towards the conclusion of the 12th section, "and all and every person and persons who shall become absolutely entitled to any such legacy or residue, or part of residue, so to be enjoyed in succession, shall, when and as such person or persons respectively shall receive the same, or begin to enjoy the benefit thereof, be chargeable with and pay the duty." I think it is impossible to say that Lord Bective ever "received" his legacy, because he could not and did not receive it; but I do think it is possible and right to say that he "began to enjoy the benefit" of it. No doubt, that was only at the moment of his death, and even then the enjoyment might,

KEKEWICH J. 1895 LORD KENLIS v. HODGSON.

as I have already mentioned, have been for a while postponed; but it does not seem to me either improper, on the words of the section standing alone or with reference to the cases which have been cited by Mr. Vaughan Hawkins, to hold that the enjoyment by Lord Bective himself did begin when he himself was no longer in existence and could not therefore personally receive the money. There are many other phrases in the same section all framed in the same way; and, to my mind, the chargeability of the estate to duty depends rather more upon the earlier part of the section than on the latter. The latter seems rather to point to the time when the duty is to be paid, whereas the actual charge of the duty on the estate is made by the earlier part of the section. The section, in that point of view, does not seem to me to have much to do with it. It deals, no doubt, with this particular class of property, property laid out in the purchase of land, but I do not think it touches this particular point, though there is a reference to persons being entitled to an estate of inheritance in possession in real estate to be purchased, on which perhaps a similar comment might be made.

Then, if that is the right view of the section, how is it touched by the decision of Bacon V.-C. in *In re Haygarth's Trusts*? (1) If I thought that decision covered this case, even though it was a decision on a different part of the section, and even though the exact point which I am called upon now to decide was not decided by the Vice-Chancellor, I certainly should follow his decision without cavil, and leave it to the Court of Appeal to say whether it is right or not. But it seems to me that the case of *In re Haygarth's Trusts* (1) has nothing to do with the present case, and that the facts in that case are so entirely different from those here that the judgment must be treated as having no application to the case before me. The question there was whether the father, who had become entitled to his son's estate, was to pay a duty in respect of that son's interest, which was an interest in reversion expectant on the father's death, and the claim of the Crown was for the duty on the whole of the fund in respect of the prospective succession of

(1) 22 Ch. D. 545.

the son or his estate to the father. It was argued, and successfully argued, that all that was claimed was duty in respect of the son's estate, and that, if affidavit duty was to be paid on the son's estate, then no further duty was to be paid in respect of it, by reason of the application of s. 41 of the Customs and Inland Revenue Act, 1881. That seems to me to have no application at all to what I have to deal with here. I am not dealing with prospective succession at all, but with an event which has actually occurred. Lord Bective has become entitled —that is to say, his estate has. He was, at the moment of his death, entitled to this fund, and there was no other event for which to wait.

But, besides that, the duty is not claimed in respect of Lord Bective's estate at all. Lord Bective's estate is not in the position which the son's estate occupied in *In re Haygarth's Trusts* (1): the duty is in respect of Alderman Thompson's estate, and on that the duty has not been paid.

For these reasons I think that the Crown is entitled to the duty.

Solicitors: *Upton, Atkey & Co.; Solicitor of Inland Revenue.*

(1) 22 Ch. D. 545.

G. I. F. C.

C. A.
1895
May 20.

In re TUCKER'S SETTLED ESTATES.

Settled Land—Improvements executed without Scheme—Payment by Tenant for Life—Re-imbursement out of Capital Moneys—Jurisdiction—Repairs—Sanitary Arrangements—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38) *s.* 21, 25, 26—*Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69) *ss.* 13, 15.

Under s. 15 of the Settled Land Act, 1890, the Court has jurisdiction to sanction the application of capital moneys in repaying to a tenant for life the expenses of improvements on the settled estate executed and paid for by him without the submission of a scheme. But in exercising such jurisdiction the Court will take care that no expenses shall be thrown upon capital, which as between tenant for life and remainderman ought in fairness to be paid out of income.

The cost of works which are not permanent improvements likely to benefit the remainderman more than the tenant for life, but are mere repairs or works incidental to the ordinary use, occupation, and enjoyment of the property, ought not to be allowed out of capital moneys arising under the Settled Land Acts.

The cost of additions to and alterations in the drainage and sanitary arrangements of a mansion house *held* to fall within this principle.

APPEAL from an order made by Kekewich J., sitting in chambers for Chitty J. The order was made upon an originating summons taken out under the Settled Land Acts, 1882 to 1890, by the tenant for life of a settled estate, asking that the trustees of the settlement for the purposes of those Acts might be directed to apply out of capital moneys in their hands arising under the Acts and subject to the settlement, the sum of 652*l.* 7*s.* 8*d.*, in payment for certain improvements upon the settled lands.

The improvements in question consisted of (*a*) additions to and alterations in drainage and other works for sanitary purposes in connection with the principal mansion-house, and stated to be requisite in order to make the house habitable by a tenant, and to enable it to be let; (*b*) the re-building of certain stables and the sinking of a well upon a farm; and (*c*) the supply of pure water to and the sinking of a well upon another farm. These works were done by the tenant for life at the end of 1893 and the beginning of 1894, at a time when there were no capital moneys subject to the settlement in hand, and available for being laid out in improve-

ments; and the tenant for life had caused the improvements to be executed without submitting any scheme to the trustees, in accordance with s. 26 (1) of the Settled Land Act, 1882, and in part in order to meet the requirements of a then intending lessee. The total expense of these improvements was 652*l.* 7*s.* 8*d.* Of this sum 175*l.* 5*s.* had been expended upon the sanitary works in connection with the mansion-house, 100*l.* 15*s.* in the rebuilding of the stables, and 29*l.* 6*s.* 10*d.* in the sinking of the well on the first farm, making together 305*l.* 6*s.* 10*d.*, and this amount the tenant for life had himself paid out of his own pocket. The remainder of the 652*l.* 7*s.* 8*d.*, viz., 347*l.* 0*s.* 10*d.*, was the cost of sinking the well and supplying the water to the other farm, and this amount was still unpaid.

Kekewich J. on March 4, 1895, was of opinion that the Court had no jurisdiction under the Settled Land Act, 1890, s. 15 (2), to allow capital moneys to be applied in recouping to a tenant for life money which he had already paid out of his own pocket for improvements; and accordingly, while authorising the trustees to pay out of the capital moneys in their hands the 347*l.* 0*s.* 10*d.* remaining unpaid, his Lordship refused to sanction the repayment of the 305*l.* 6*s.* 10*d.* which had been already paid by the tenant for life.

The tenant for life appealed.

Ashton Cross, in support of the summons. The powers of the Court were enlarged by the Act of 1890, and under s. 15 there is jurisdiction to authorize the application of capital moneys in

(1) Sect. 26 of the Settled Land Act, 1882 (45 & 46 Vict. c. 38), is as follows: "(1.) Where the tenant for life is desirous that capital money arising under this Act shall be applied in or towards payment for an improvement authorised by this Act, he may submit for approval to the trustees of the settlement, or to the Court, as the case may require, a scheme for the execution of the improvement shewing the proposed expenditure thereon."

(2) Sect. 15 of the Settled Land Act, 1890 (53 & 54 Vict. c. 69), is as follows: "The Court may, in any case where it appears proper, make an order directing or authorizing capital money to be applied in or towards payment for any improvement authorised by the Settled Land Acts, 1882 to 1890, notwithstanding that a scheme was not, before the execution of the improvement, submitted for approval, as required by the Act of 1882, to the trustees of the settlement or to the Court."

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payment for improvements, authorized by the Acts, which have been already executed without the submission of a scheme. This alteration of the law was made to meet such a case as *In re Hotchkin's Settled Estates.* (1) And it never could have been the intention of the legislature that the right of the tenant for life to relief should depend upon whether or not he had paid the bill. Here there was no money in hand to pay for improvements, and the tenant for life had to choose between losing his tenant and executing the improvements. So he ordered the improvements to be executed, and as a matter of convenience paid for some of them out of his own pocket.

[LOPES L.J. referred to *In re Dalison's Settled Estate* (2) and *In re Lord Gerard's Settled Estate.* (3)]

These works were improvements within the meaning of the Settled Land Acts: *In re Gaskell's Settled Estates* (4); *In re Houghton Estate.* (5) Kekewich J. has already sanctioned the expenditure so far as it has not been paid, and the only question is as to the reimbursement of the tenant for life for what he has paid.

I submit that the Court has a discretionary power to sanction the repayment of the sums he has expended, and that this is eminently a case for the exercise of such discretion: *In re Ormrod's Settled Estate.* (6)

W. Howland Jackson, for the trustees. It is true that s. 15 of the Act of 1890 gives the Court jurisdiction in a proper case to sanction the application of capital moneys in payment for improvements, notwithstanding that no scheme has been submitted by the tenant for life; but there is nothing in the section which empowers the Court to sanction the repayment of expenses for improvements which the tenant for life has chosen to order and execute, and to pay for out of his own pocket. These payments were made a year and a half ago, and some of these expenses were incurred for works which were not improvements fairly chargeable to capital, but were mere repairs. *In re Ormrod's Settled Estate* (6) is in our favour.

(1) 35 Ch. D. 41.
(2) [1892] 3 Ch. 522.
(3) [1893] 3 Ch. 252.
(4) [1894] 1 Ch. 485.
(5) 30 Ch. D. 102.
(6) [1892] 2 Ch. 318.

LINDLEY L.J. I think that in these cases we ought not to tie our hands tighter than the legislature has tied them. I am not disposed to say that in no case can the Court empower trustees to reimburse to a tenant for life such money as he has disbursed upon the estate for a purpose authorized by the Settled Land Act for the expenditure of capital money. Although, however, I am not prepared to say that the mere fact of payment prevents the Court from allowing the expenditure, yet I do say that when the tenant for life has made the payment himself, and comes to the Court to ask to be reimbursed, the Court is bound to be very vigilant and careful in looking into the matter. It is very difficult after the work has been done to judge what was proper to be done at the outset. The tenant for life ought to go to work in a proper way. If a tenant for life does not take the trouble to prepare a scheme shewing the proposed expenditure, but goes to work on his own account without anything of the sort, and then comes to the Court asking to be reimbursed, he must not be surprised if the Court is not very ready to assist him in getting the cost of what he has done out of the capital of the estate. If he wants the assistance of the Court he ought to take the proper steps required by the Act of 1882. The Act of 1890 has greatly enlarged the powers of the Court, but the more those powers are enlarged the more carefully they should be exercised. It is, I take it, the duty of the Court to consider what is fair and right as between tenant for life and remainderman, and the Court ought not to throw upon capital expenses which in fairness ought to come out of income — such, for instance, as expenses for what are really mere repairs. But, supposing that what has been done does come within the objects for which the Act allows the expenditure of capital money, the Court is not bound to authorize such expenditure to be made out of the capital. We must look at the matter from a business point of view and see whether it is fair and right that the expense should come out of the capital, or whether it was incurred in respect of things which are part of the ordinary incidents of occupation. It may be that some of the things which have been done in this case are improvements within the meaning of the Acts, but a considerable part of the expenditure was incurred in

C. A. 1895 *In re* TUCKER'S SETTLED ESTATES. Lindley L.J.

respect of matters which were incidental to the ordinary use and enjoyment of the property, and the expenses of which, as between tenant for life and remainderman, ought not to be thrown upon the remainderman. The 175*l.* 5*s.*, for instance, was an expenditure which, in my opinion, could not properly be thrown upon capital. What, then, ought to be done? I do not take the view that the Court is bound to refuse to allow this expenditure out of capital simply because the money has been already paid. Some of the items are such as ought fairly to be thrown on capital, and I think that justice would be done if we were to authorize the trustees to pay the tenant for life 100*l.* in addition to what Kekewich J. has allowed him.

LOPES L.J. The expenses in this case were incurred about a year and a half before this application by the tenant for life, and the work was in part paid for by him. He now comes to the Court, and asks under s. 15 of the Act of 1890 for repayment of what he has paid. Kekewich J. has decided that the Court has no jurisdiction to direct repayment of any sums already paid by the tenant for life, and the question is whether or no there is such jurisdiction. That depends upon s. 26 of the Act of 1882 and s. 15 of the Act of 1890. [His Lordship then read both those sections, and continued:—]

Under the former section I should say that there was no jurisdiction to allow reimbursement in this case, because according to that section a scheme for the execution of the improvements had to be submitted if the tenant for life was desirous that capital moneys should be applied in payment for them.

The latter section does away with the necessity for a scheme. At first I was inclined to think that there was no jurisdiction to allow repayment to a tenant for life, but I now think that is too narrow a construction to put upon the section, and that there is jurisdiction to allow payment of the money out of capital although it has been already paid by the tenant for life. Where, however, the Court is asked to exercise this power after the execution of the works, the application cannot be regarded in the same light as if it had been made before they were executed. In such a case the Court will look at the matter more critically

and carefully, and will act with greater jealousy and anxiety; and for this reason: when the work has been done it is more difficult for the Court to determine whether or no the improvements were necessary and reasonable. There is no longer the same opportunity of seeing the old state of things for which the new improvements are substituted, and the matter cannot be determined with the same accuracy as if the application had been made before the work was done. Extreme care ought therefore to be exercised by the Court in determining whether the expenditure which has been made ought to be allowed out of capital. In the present case a large proportion of the so-called improvements are alterations rather in the nature of repairs. It is not easy to determine what are the kind of improvements of which the expense ought to be borne by the tenant for life and what are those of which the expense ought to be thrown upon capital. But the Court must take a business-like view of the matter and determine what is fair as between man and man. It is impossible to lay down any general rule, but what is usually done by a man in occupation of premises must be done at the expense of the tenant for life. If, however, the things that are done are not such as are usually done by the occupier, but are in the nature of permanent improvements of a larger character, likely to benefit the remainderman more than the tenant for life, then it is fair that the expense of them should come out of capital. In every case the question must depend upon the circumstances, and in the present case I think that some of the things that have been done and which are called improvements, are really repairs, and ought to be paid for by the tenant for life. Accordingly, if we order the trustees to pay him 100*l.* in addition to that which has been already allowed, I think we shall be doing ample justice between the parties.

Kay L.J. I agree, and I have nothing to add.

Lindley L.J. The trustees' costs will come out of the capital of the estate. The tenant for life must pay his own.

Solicitors: *H. S. Knight Gregson; Barton & Pearman.*

W. W. K.

C. A.
1895
June 13, 14.

BETJEMANN *v.* BETJEMANN.

[1894 B. 2248.]

Statute of Limitations—Partnership Accounts—New Partnership—Concealed Fraud.

A father and his two sons, J. and G., carried on business together as partners from 1856 to 1886, when the father died. There were no articles of partnership, and no settled accounts. After the father's death the two sons carried on the business as partners without winding up the old partnership and without coming to any settled account. J. died in 1893, and his executrix brought an action against G. for an account of the partnership dealings since the father's death in 1886. G. claimed to have the accounts of the old partnership taken from 1856, alleging that he had recently discovered (as he proved to be the fact) that J. during his father's lifetime fraudulently drew more than his share from the partnership funds, and that the fraud was concealed from his co-partners:—

Held (reversing the decision of Wright J.), first, that, although the old partnership was terminated by the death of the father, the Statute of Limitations was no bar to taking the accounts before that date, the accounts having been carried on into the new partnership without interruption or settlement:

Secondly, that if the Statute of Limitations had applied, the fact that there had been concealed fraud would have been a bar to its operation, although such fraud might have been discovered at the time by G. if he had used due caution; a partner being entitled to rely on the good faith of his co-partners.

Knox v. *Gye* (L. R. 5 H. L. 656), distinguished.

Rawlins v. *Wickham* (3 De G. & J. 304), followed.

George Betjemann carried on the business of a dressing-case manufacturer in partnership with his two sons John Betjemann and George William Betjemann from the year 1856 till his death in September, 1886. In 1870, on the marriage of John, there was a fresh arrangement between the partners as to their shares, but there were no articles of partnership and no settlement of accounts. George Betjemann by his will gave his residuary real and personal estate to his two sons equally, and appointed his son George William Betjemann his executor.

After the death of their father, his two sons carried on the same business without any articles of partnership, sharing the profits equally between them. The stock-in-trade at the death

of George Betjemann was valued, for the purposes of probate, at 16,000*l.*, and duty paid on his share.

John Betjemann died on December 21, 1893, having by his will appointed his wife and two other persons his executors. The will was proved by his wife alone.

The present action was brought by John Betjemann's widow against George William Betjemann for an account of the partnership dealings from September 1886 to December, 1893, and to have the affairs of partnership wound up.

The defendant in his defence stated that the partnership between George Betjemann and his two sons was carried on without any articles of partnership, and that since 1870 the partners were entitled to the profits and assets in equal shares; and that the partnership was to continue during the joint lives of the three partners and the joint lives of the survivors. He also stated that he had recently discovered that John Betjemann, previously to the death of his father, had drawn out large sums, which were greatly in excess of his proper share, and that such drawings had been concealed from his partners. He also accused John Betjemann of other fraudulent dealings with the funds of the partnership. The defendant, by way of counter-claim, claimed to have an account taken of the partnership dealings from the year 1870, and if necessary from 1856, and to have what should be found due from the plaintiff's estate paid to the defendant.

The plaintiff in her reply alleged that the partnership between George Betjemann and his two sons, if it existed at all, was dissolved on the death of the father, and she claimed the benefit of the Statutes of Limitations with reference to any claim of the defendant on the estate of John Betjemann in respect of the partnership before the death of the father.

The action was tried by Wright J., sitting as a judge of the Chancery Division.

It appeared from the evidence that the books and accounts of the business during the life of George Betjemann were very irregularly kept, and that there were no settled accounts of the partnership dealings; but an account was signed by both the sons of their father's interest in the business for the purposes of probate after his death. His Lordship held upon the evidence

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that the partnership between the father and his two sons was dissolved by the death of the father; that there was proof of fraudulent dealings with the funds of the partnership on the part of John Betjemann, and that he had concealed these fraudulent dealings from his partners. But he held that the fraud would have been discovered by ordinary and reasonable precaution and inquiry by the defendant, who did not make proper inquiries till about two years ago, and therefore that the defendant could not avoid the action of the statute on the ground of the concealment. He therefore gave judgment for taking the accounts of the partnership since 1886, and dismissed the counterclaim, but made no order as to costs.

The defendant appealed.

Sir H. James, Q.C., Hopkinson, Q.C., and *Edward Ford*, for the appellant. The learned judge has found on the evidence that there was fraud on the part of John Betjemann, and that the fraud was concealed; but he held that the fraud might have been discovered by his partner if he had used reasonable precaution. But the necessity of shewing that the concealed fraud could not have been discovered if there had been reasonable precaution does not apply to partners who, by the very nature of their contract, are supposed to trust their co-partners; *Rawlins* v. *Wickham*. (1) The accounts in the time of the defendant's father were very loosely kept, and no settlement was come to, and nothing has been done which could take away the defendant's right to have the account asked for.

Cozens-Hardy, Q.C., and *Fooks*, for the plaintiff. There is no reason why the rule as to reasonable caution and diligence should not apply to partners. The evidence shews that the partners at the time of the death of the father did not implicitly trust one another. There was considerable friction between the brothers, and the defendant, moreover, complained of his brother drawing more than his share. He was, therefore, put upon inquiry, and could easily have found out the whole truth. There was a settlement of accounts to a certain extent when the father died, for the valuation of his share in the business for probate

(1) 3 De G. & J. 304.

duty was agreed to by both brothers: *Gibbs* v. *Guild* (1); *Lawrance* v. *Lord Norreys* (2); *Maund* v. *Allies* (3); *Knox* v. *Gye*. (4)

Hopkinson, Q.C., in reply, referred to *Burdick* v. *Garrick* (5); *Blair* v. *Bromley*. (6)

Cur. adv. vult.

June 14. LINDLEY L.J. The question raised on this appeal is as to the time from which a partnership account is to be taken. The material facts are very short. It appears that there was a father who commenced business in partnership with his two sons in 1856. In 1870 one of the sons, John, married, and we are told there was some new arrangement come to at that time. In 1886 the father died, and in 1893 one of the sons, John, died. An action has been brought by his legal personal representative against the surviving son, who is also an executor of the father, for a partnership account; and the plaintiff has obtained the usual decree for an account of the partnership as from 1886, when the father died. The defendant does not resist that of course; but he says the account ought to be taken from 1870, and, if necessary, even from 1856. The plaintiff objects to that, and the question really is from what time this partnership account ought to be taken, whether it ought to be taken from 1886, when the father died, or from some earlier time, from 1870, or even from 1856 if desired.

The learned judge has directed the account only from 1886. In my opinion this is wrong. There is no doubt that in 1886, when the father died, there was a partnership between the three which determined on that event. One died, and, to use the expression of one of the witnesses, the other two went on as before, minus one. That is quite true, and there is no doubt now, after the decision of the House of Lords in *Knox* v. *Gye* (4), that the executors of the father who had died could set up the Statute of Limitations to an action for an account brought by his surviving partners more than six years after his death. They did not do anything of the sort. The Statute of Limitations is

(1) 8 Q. B. D. 296; 9 Q. B. D. 59.
(2) 15 App. Cas. 210.
(3) 5 Jur. 860.
(4) L. R. 5 H. L. 656.
(5) L. R. 5 Ch. 233.
(6) 2 Ph. 354.

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set up by the plaintiff. But who is the plaintiff? The plaintiff is the executor of John; and although John and George William the two sons continued the partnership, it was, in point of law, a different partnership, viz., a partnership between two. They continued the partnership account as one account, and never wound it up; they brought in all the balances, carried on the balances at the bankers, carried on the ledgers, and carried on the account without a break. Now as between persons who deal with each other upon that footing, I fail to see that the Statute of Limitations has any application whatever. Notwithstanding, therefore, that the partnership was determined between the three, and that there was a new partnership between the two, there was no break in the account, and the account was never brought to an end. My view is that the learned judge misapplied the doctrine of *Knox* v. *Gye* (1) in holding as between these two brothers, who went on without a break, that the account could be considered as severed in 1886, and that there was a new cause of action arising then.

Now, even if I am wrong in that, it appears to me, I confess, that the learned judge is wrong upon the other point. The surviving partner then says: "If the statute is an answer, this is a case of concealed fraud"; and he proves that John did commit frauds in the way which was explained in the course of the argument, and which is not now disputed. The plaintiff's answer to that is that although John committed these frauds, the surviving partner had every opportunity of discovering them, and under these circumstances the statute applies, and the doctrine of concealed fraud is excluded. That appears to me to be erroneous and contrary to all the principles which a Court of equity has been in the habit of applying as between partners. I say nothing of the manner in which the Court has dealt with the question as between trustees and cestuis que trust, although I daresay that would be found to be based on similar principles. This doctrine of means of knowledge which is incorporated in terms in the Statute of Limitations 3 & 4 Wm. 4, c. 27, s. 26 is perfectly reasonable as applied to cases of ejectment. If a man brings an action of ejectment to recover property after twenty

(1) L. R. 5 H. L. 656.

years lapse of time, it is only reasonable to say that, even in the case of concealed fraud, the statute shall apply if he has means of knowledge and has not used them. That is intelligible enough; but Field J. in *Gibbs* v. *Guild* (1) went a little too far when he said the 26th section expressed the whole doctrine of equity applicable to concealed fraud. As between such persons as vendor and purchaser, where the maxim of caveat emptor applies, the observations of the learned judge were not open to criticism. I am not aware that there is any difference between law and equity in cases of that kind; but the learned judge was not correct in applying the same rule to partners. What right has a partner to say to his co-partner: "You ought not to have trusted me. You are bound to look at the books and see that I am not cheating you"? Such a doctrine as that is unfounded. I am not expressing this view of the law for the first time, for the doctrine will be found very well put in the leading case of *Rawlins* v. *Wickham*. (2) There a partner had been induced to enter into a firm by a fraudulent misrepresentation. He continued a partner for four years, he had access to the books, and he had means of knowledge and means of finding out that he had been induced by these fraudulent representations to become a partner, and that circumstance was strongly relied upon as an answer to a suit in equity brought by him to have the contract for partnership rescinded and to be indemnified against the liabilities of the firm. How did Knight Bruce and Turner L.JJ. deal with that? I will read a passage from the marginal note before I read the passage in the judgment: "Where a person has been induced to enter into a contract by a material misrepresentation of the other party, he is entitled to have the contract set aside, and not merely to have the representation made good. Held, that the lapse of time was no bar to the plaintiff; for that although he had means of ascertaining the representation to be untrue, he was entitled as between him and the persons who made it to believe it to be true, and was not bound to make inquiry until there was something to raise suspicion." Knight Bruce L.J., who goes into this matter with great care, says (3):

(1) 8 Q. B. D. 296; 9 Q. B. D. 59. (2) 3 De G. & J. 304.
(3) 3 De G. & J. 313.

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"If, therefore, Mr. Rawlins"—that is the plaintiff—"had discovered the misrepresentation earlier, and complained earlier, there could not have been any doubt as to the result. The extraordinary circumstance is the duration of the partnership for four years, during the whole of which time Mr. Rawlins might have inspected the books; might at least in some sense have done so; for I am not satisfied that difficulties would not have been thrown in his way, or that Mr. Bailey would not have objected. He, however, did not examine them, and, improbable as it may appear, I must hold that Mr. Rawlins entered into the partnership in complete ignorance of the contents of the books, and continued so for four years. Now there are many purposes for which a gentleman, in the position of Mr. Rawlins, could not be heard to say that he did not know the contents of the books. As regards many persons it was his duty to know them; but was it his duty as between himself and Mr. Wickham and Mr. Bailey, who had brought him into partnership as they did? I think not. He was entitled to believe their representations to be accurate, without looking at the books. He was entitled to continue in that belief until ground for suspicion arose, or information was given him by one of the partners. No such information was given." Turner L.J. makes remarks to the same effect. It appears to me that that is the principle which is applicable to a case of this kind of means of knowledge; unless suspicion is proved, and unless the person complaining not only has means of knowledge, but does not choose to avail himself of that means when his suspicion is aroused, it is not ad rem. On that ground it appears to me that the defendant is right in his counter-claim.

The result, therefore, is that the appeal must be allowed. Instead of the counter-claim being dismissed without costs, an account must be directed as from 1870, or logically, if the parties wish it, from 1856. I leave them to settle that, and as to the costs, I take it that the costs of the counter-claim ought to be the defendant's in any event, because the counter-claim included the case of fraud. That has cost a great deal of money, and the defendant is right in that he has proved his fraud, and he is entitled, I think, to the costs occasioned by the denial of that fraud. He is also entitled to the costs of the appeal. The costs

of the partnership suit will be dealt with in the ordinary way; but the costs of the counter-claim and of the appeal ought to be the defendant's in any event.

LOPES L.J. I am of the same opinion, and I will not add anything further.

RIGBY L.J. I am also of the same opinion, and I should not think it necessary to add anything at all but for the respect I have for the judgment of the learned judge, and I will only put shortly the grounds (which are substantially those expressed by Lindley L.J.) on which I think that this appeal should be allowed.

First of all, there has been a continuous account from 1856, through 1870, down to 1886. There has been nothing approaching to a settled account. The account has been kept on from day to day. When the two formed their new partnership—for it is a new partnership of course—they did it on the terms that they would not interfere with the accounts. All the accounts of the old firm with the customers were continued by the two who formed the new partnership. Under those circumstances I do not see that there is any ground whatever for applying the Statute of Limitations to this case; but if you do apply the Statute of Limitations it is a matter of essential importance to call to mind the doctrine of the Court of Equity in cases of concealed fraud. That there was concealed fraud here is abundantly plain. Apparently if this gentleman had drawn out all these moneys in his own name it might have been discovered; in fact, when he did that on anything like a large scale it was discovered, because in that case there was no concealment. The device adopted was such that, on examining the banker's pass-book with the cheques that were actually in their possession, I suppose they found them to correspond altogether; and the very reason for drawing a cheque as if it were for a payment to a customer was to conceal the thing from the partners. That concealment was effective, and upon the evidence it continued to be effective until a time well within the Statute of Limitations. Now that there were means of discovering the fraud there can be no doubt at all—I am not at all

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sure that that would have been done by anything like a cursory inspection of the books—but clearly if there had been anything like an audit the fraud must have been discovered. Then the question is whether it is involved in that case of *Gibbs* v. *Guild* (1), or whether it is shewn to be the doctrine of a Court of Equity before the Judicature Act, that concealed fraud only postpones the running of the statute in cases where there was no sufficient means of discovering it, and upon that point I can entertain no doubt. First of all, in *Gibbs* v. *Guild* (1) the cases are gone very carefully through, and I will not attempt to repeat them, because I adopt all that is said by the Court of Appeal in that case, and it appears that there are other cases, such as *Booth* v. *Earl of Warrington.* (2) The equitable doctrine came to this, that the statute did not run, or the law which the Court of Equity applied in these cases did not attribute laches, or negligence, until the discovery of the fraud; and in none of them, so far as I recollect (I have not had time to look through the authorities in the way I should have thought it necessary to do if I had entertained myself any doubt about it), was it part of the defence that there were no reasonable means of knowledge. What is the duty of a man to inquire? To whom does he owe that duty? Certainly not to the person who has committed the concealed fraud. For a man in that position to come and say, "You ought to have inquired, and if you had inquired you would have found me out," is utterly opposed to every principle of equity. I consider that we ought to take the law, so far as it is applicable to this case, from the Court of Appeal, and not from the judgment of Field J. in the Court below; and there they place it entirely on what I have always understood to be the old law, that the time runs against you in the Court of Equity from the time when the concealed fraud has been discovered. I concur with what Lindley L.J. has said about *Rawlins* v. *Wickham.* (3) It is a different case entirely, but it contains the principle on which I believe the Court has always acted, and I think it ought to act.

I agree that here, with care—with the usual care I may say—this ought to have been discovered long before; but as regards

(1) 8 Q. B. D. 296; 9 Q. B. D. 59. (2) 4 Bro. P. C. 163.
(3) 3 De G. & J. 304.

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the person on whose behalf the claim is set up, it does not lie in his mouth to say, "I was fraudulent, but you ought to have found me out, and I will take advantage of the fact that you did not find me out." I agree with what Lindley L.J. said about the costs.

It was agreed between the parties that the accounts should be taken from 1856.

Appeal allowed.

Solicitors: *Eugene H. Goddard; Beyfus & Beyfus.*

M. W.

In re KNOX'S TRUSTS.

C. A. 1895 *June* 24.

[1895 K. 07.]

Trustee—Refusal to transfer Stock on Request—Petition—Vesting Order—Costs against Trustee—Trustee Act, 1893 (56 & 57 *Vict. c.* 53), *ss.* 35, *sub-s.* 1 (*ii.*), (*d*), 38.

Trustees who held a residuary estate upon trust, in events which had happened, to divide the same amongst three sets of beneficiaries, were requested in writing by all such beneficiaries to transfer to them the various funds of which the residue consisted according to an arrangement which they had entered into. It appeared that there was sufficient cash in the hands of the trustees to pay any outstanding costs which they might have to pay, but one of the two trustees refused to transfer for twenty-eight days after the request.

Kekewich J. *held* (see [1895] 1 Ch. 538, 542), that there was no justification for the trustee's refusal, and made a vesting order against him under s. 35 of the Trustee Act, 1893, ordering him to pay the costs of the application upon the ground that it was the result of his own obstinacy:—

Held, by the Court of Appeal, that the Court had jurisdiction to make the vesting order, and to order the recusant trustee to pay the costs of the application.

Appeal dismissed with costs.

APPEAL from Kekewich J.

On January 2, 1895, a petition was presented by Alfred Charles Cronin, one of the trustees of the will of George Knox, deceased, and by all the residuary legatees thereunder, praying for a vesting order under s. 35 of the Trustee Act, 1893, on the

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ground that William Smail, the other trustee, had refused to transfer stock for twenty-eight days next after a request in writing in that behalf made pursuant to the section. The petition was served a few days after it was presented, and before the expiration of twenty-eight days from the making of the request; but it was answered for a date after the expiration of that period, viz. February 16.

On March 2 Kekewich J. held (1) that the petition had been presented prematurely because the jurisdiction to make the order did not arise before the period of twenty-eight days had expired, and accordingly that the Court could not make an order upon a petition presented before the expiration of such period; but his Lordship allowed the petition to stand over, the petitioners being at liberty to present and serve it de novo.

The petition, having been presented and served de novo, came on again on March 9 to be heard on the merits, when Kekewich J. held (2) that there was no justification for the refusal of the respondent to transfer, and made the vesting order. His Lordship said that the application was entirely the result of the respondent's obstinacy, and he must pay the costs; but as the petition had been presented prematurely, there must be deducted from the costs to be so paid those consequent upon the petition being presented and served de novo according to the direction given on March 2.

From this decision of March 9, 1895, the respondent now appealed.

It appeared that under the trusts of George Knox's will Mr. Cronin and Mr. Smail (who were brothers-in-law and solicitors), as the executors and trustees of the testator, held his residuary estate upon trust, in the events which had happened, as to one third part thereof for his daughter Miss Knox, as to another third part to transfer, pay, or otherwise assure the same to the trustees of Mr. and Mrs. Cronin's marriage settlement, and as to the remaining third part thereof to transfer, pay, or otherwise assure the same to the trustees of Mr. and Mrs. Smail's marriage settlement. The rest of the material facts sufficiently appear in the judgment of Lindley L.J.

(1) See [1895] 1 Ch. 538. (2) [1895] 1 Ch. 542.

Marten, Q.C., and *Methold*, for the appellant. The petition for the vesting order was presented prematurely and without justification, and ought to have been dismissed with costs. Sect. 35 of the Trustee Act, 1893 (1), is a highly penal clause intended to meet the case of a trustee who without shadow of right obstinately refuses to transfer; but here the trustee was requested to part with the estate of the testator before the costs of the trustee had been paid or ascertained, and where there might be outstanding costs of which he had no knowledge—a proceeding which is contrary to the general course of practice. A cestui que trust has no right to use this clause for the purpose of taking the whole estate away from the trustees before their reasonable costs have been paid or provided for out of it. When the second petition was presented Mr. Smail had a right to have his costs of the first petition as well as any other outstanding costs paid out of the fund; so it was not a clear fund, and the 35th section was not applicable.

S. Hall, Q.C., and *O. L. Clare*, for the respondents. The order appealed from was perfectly right. There was sufficient cash in hand to pay all costs; there was no duty on the part of the trustees to realize the estate, and they were required by all the beneficiaries to make a simple division. It is a clear case of obstinate refusal on Mr. Smail's part.

Marten, Q.C., in reply.

LINDLEY L.J. This appeal is based upon the theory that the vesting order was improperly made, and, of course, if the vesting order falls to the ground, the order as to costs must fall also. The first point, therefore, is whether the learned judge had juris-

(1) Sect. 35 of the Trustee Act, 1893, is, so far as material, as follows:—

Sect. 35: "(1.) In any of the following cases, namely . . . Where a trustee entitled alone or jointly with another person to stock or to a chose in action . . . (*d.*) neglects or refuses to transfer stock or receive the dividends or income thereof, or to sue for or recover a chose in action, according to the direction of the person absolutely entitled thereto for twenty-eight days next after a request in writing has been made to him by the person so entitled . . . the High Court may make an order vesting the right to transfer or call for a transfer of stock, or to receive the dividends or income thereof, or to sue for or recover a chose in action, in any such person as the Court may appoint."

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diction under the 35th section of the Trustee Act, 1893, to make the order; and I confess I have no doubt at all that he had ample jurisdiction to do so. It appears that some time ago a certain fund fell in, which represented the residue of an estate, subject to the trusts of a will of which Mr. Cronin and Mr. Smail were executors and trustees. It was not their duty to realize this fund, but to divide it according to an arrangement which had been made between the beneficiaries, the effect of which was that one portion was to be allotted and transferred to Miss Knox, another portion to the trustees of Mrs. Cronin's settlement, and the remaining portion to the trustees of Mrs. Smail's settlement. Both Mr. Cronin and Mr. Smail were solicitors, and a formal request in writing, dated January 10, 1895, was made to the trustees by all the persons entitled to the residue to allot and transfer the fund according to this arrangement, and by this document the trustees were also authorized and requested "to discharge your costs properly payable out of the cash in your hands, and to divide the balance thereof so as to equalize the amount of the respective shares." This was forwarded to Mr. Smail's solicitor, together with three sets of transfers for execution, and a letter from the solicitor of the beneficiaries stating that Mr. Cronin concurred in the request and was prepared to act thereunder; and that there appeared to be "no doubt as to the sufficiency of the cash in one of your client's hands for payment of the proper costs and for equalization of the shares." In the petition for the vesting order there was a statement that the cash in the hands of the trustees was ample to adjust any outstanding costs which might exist, leaving the corpus of the fund free for transfer. This was not denied by Mr. Smail; but his counsel contended that there might have been outstanding costs of which Mr. Smail was unaware, and that he had no means of knowing whether the money in hand was sufficient to meet them or not. I am satisfied that this was a mere excuse. There never was any real doubt that the cash in the hands of the trustees was sufficient to cover all costs up to date. Then followed the petition for a vesting order. It was a very unfortunate step to take, and I suppose it occasioned some further costs. The petition was unquestionably premature, and Kekewich J. so decided;

and when it was re-presented the learned judge made the vesting order, as he plainly had ample jurisdiction to do, and, taking the view that Mr. Smail had been obstinate, made him pay the costs of the application for a vesting order, though not those of the abortive petition, which were specially provided for.

This appeal is from that decision; and I cannot say that I think there is any justification for bringing it. There has been an unfortunate amount of feeling, which I regret; but Mr. Smail was technically wrong in refusing to divide these funds, for it is clear upon the evidence that but for that unfortunate petition there was ample cash in hand to cover all costs. The scheme was a simple one, and Mr. Smail ought to have concurred in it, and not to have tried to thwart it. I think the view taken by Kekewich J. was the right one, and that this litigation is due more to Mr. Smail's obstinacy than to any ill-feeling on the other side. The appeal must consequently be dismissed with costs.

Lindley L.J.

LOPES L.J. I agree. Directly it is made clear that there was sufficient money in the hands of the trustees to cover any outstanding costs there might be, which I think is made clear, this case is free from difficulty; because I cannot for one moment see how, in such circumstances, Mr. Smail was justified in not transferring these securities in the way he has been asked to do. All the beneficiaries agreed that they might properly be so dealt with, and the will also was not one which provided for the conversion of these securities into money, and then for a division of the money, but for the transfer of the securities themselves. It seems to me, therefore, that the learned judge was right when he said that the application, as then heard, was the result of the appellant's obstinacy, and that he must pay the costs. Of course, the costs of the abortive petition would have to be deducted; and I think, therefore, that the decision of the learned judge was right, and that this appeal must be dismissed.

RIGBY L.J. I am of the same opinion. The duty of the two executors and trustees in this case was a very plain one: they had to transfer the stocks to the beneficiaries. Unquestionably

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Mr. Smail would not have been compellable to transfer if he had a solid case that there were liabilities which might fall upon him. But he does not attempt to make it out. He only says (in effect), "Before I transfer these stocks I must have a complete and final winding up of every part of the trust." I think the order made was perfectly right.

Solicitors: *J. E. & H. Scott; Chester, Mayhew, Broome & Griffithes.*

W. W. K.

C. A. 1895 *June* 26.

BAERLEIN *v.* CHARTERED MERCANTILE BANK.

[1892 B. 1821.]
[1892 B. 1048.]

Commercial Causes—Transfer to Commercial Court when ordered—Powers of Judge—Notice of Queen's Bench Division as to Commercial Causes 1895, *Rule* 6.

The judge charged with commercial business has no further power of dispensing with the technical rules of evidence than any other judge of the High Court, the power of so doing being that conferred by General Order xxx., r. 7, which has no special reference to the commercial court. Rule 6 of the Notice of the Queen's Bench Division in 1895 as to commercial causes does not purport to extend that power.

The object of the establishment of the commercial court was not that on the one hand all commercial causes or on the other hand only short causes should be tried there, but that causes should be so tried which are likely to be more speedily, economically, and satisfactorily tried if brought before a judge having special familiarity with mercantile transactions.

A cause will not be transferred from the Chancery Division to the Queen's Bench Division to be tried as a commercial cause merely because it is a commercial cause; but the Court will consider whether from its nature it is likely to be more speedily, economically, and satisfactorily tried by the commercial court.

THIS action was commenced in the Chancery Division in 1892 to recover damages from the defendants for alleged breaches of duty by them while acting as mercantile agents for the plaintiffs. The case made by the statement of claim was that in 1888 the plaintiffs commenced business transactions with a firm of Arakie Bros. of Calcutta, and consigned goods to them. That Gonne, Croft & Co. of London acted as the agents in England of

Arakie & Co., and that arrangements were made with Frith, Sands & Co. of London, Hardy, Nathan & Co. of London, and subsequently with the defendants, under which the plaintiffs drew on these firms and on Gonne, Croft & Co. in respect of goods shipped to Calcutta, for amounts equal to the invoiced value of the cargoes. That in February, 1889, the plaintiffs, Gonne, Croft & Co., Arakie Bros., and the defendants entered into an arrangement that the defendants should receive the documents of title to the plaintiffs' shipments, forward the same to their own Calcutta branch, warehouse the goods, and not deliver any of them to Arakie Bros. except on payment of the full invoice price, and that the proceeds should be applied in retiring the bills drawn against the goods in respect of which the moneys were paid. That by a later agreement in February, 1889, it was agreed between the same parties that on written application by Arakie Bros. the defendants should be authorized to deliver to them without payment out of goods shipped by the plaintiffs, and of which the document of title should be received by the defendants from the plaintiffs or Frith, Sands & Co., goods specified in such applications to an amount not exceeding 10,000*l.* at any one time outstanding, upon Arakie Bros. giving in each case a letter of lien agreeing with the defendants to hold such goods until sold, and the proceeds when sold, in trust for the defendants and charged with the amount of the acceptances given against those specific goods. In the summer of 1889 a similar arrangement was made for free deliveries to the extent of 15,000*l.* out of goods shipped against and charged with payment of the defendants' acceptances; and in 1890 a similar arrangement was entered into for free deliveries to the extent of 10,000*l.* out of goods charged with Hardy, Nathan & Co.'s acceptances. The plaintiffs alleged a number of breaches of contract by the defendants, especially in reference to goods which had been delivered under the three several arrangements for free deliveries, and in the defendants failing to obtain letters of lien and to keep the cargoes specifically appropriated to meet the bills drawn against them. The case involved the construction of various mercantile documents and a long mercantile correspondence, and was admitted by both sides to be one of great complexity and

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difficulty. Proceedings had been taken between the plaintiffs and Frith, Sands & Co., in which a great deal of evidence had been taken relating to some of the transactions which formed the subject of this action, and which in those proceedings came before the Court of Appeal.

On May 27, 1895, the plaintiffs applied by summons to Kekewich J. for a transfer of the cause to the Queen's Bench Division with a view to its being tried as a commercial case. Kekewich J. said that though the case was a commercial case, and proper to be tried before the commercial court, yet as the plaintiffs had chosen the Chancery Division, and the defendants wished the case to remain there, he should refuse to transfer it. His Lordship refused leave to appeal. The plaintiffs applied to the Court of Appeal for leave to appeal, which on May 29 was granted.

Sir R. E. Webster, Q.C., and *T. M. Whitehouse*, for the appeal. The case is one which is clearly a commercial cause within the definition given by the notice issued in the Queen's Bench Division during the present year (1); and it is one which by its complexity and difficulty, and its depending on the construction of mercantile documents and of a long mercantile correspondence, can be best tried in a Court presided over by a judge chosen for his intimate acquaintance with mercantile transactions. A transfer to the commercial court is therefore highly desirable. The judge of the commercial court has (clause 6 of notice) powers of dispensing with the strict rules of evidence, which can be used in the present case so as to save much expense and delay.

(1) The notice issued by the judges of the Queen's Bench Division in 1895 as to commercial causes contains the following provisions: (1.) "Commercial causes include causes arising out of the ordinary transactions of merchants and traders; amongst others, those relating to the construction of mercantile documents, export or import of merchandise, affreightment, insurance, banking and mercantile agency, and mercantile usages." (6.) "Application may be made to such judge" (i.e., a judge charged with commercial business) "under the provisions of the Judicature Act, 1894, and the rules thereunder, or by consent, to dispense with the technical rules of evidence, for the avoidance of expense and delay which might arise from commissions to take evidence and otherwise."

R. M. Bray, and *W. D. Rawlins*, for the defendants. That a case is a commercial case is not a sufficient reason for a transfer. It was not intended that all commercial causes should be tried by the commercial court. There must be some ground shewn why it can be tried there better than in the Court where it is. The commercial court, we submit, was intended to do rough and ready justice in causes which could by means of it be brought to speedy trial; and there is no pretence for saying that this cause can be brought to speedy trial, it being nearly three years since the writ was issued.

Whitehouse, in reply.

LINDLEY L.J. This case is one of very considerable importance, and, after this discussion, I am not sorry that we gave leave to appeal, as it gives us an opportunity of considering the principles upon which commercial cases should be transferred from one division to another.

In the first place I hope that nothing I may say will be supposed to be based upon the superiority of one judge to another. It is not a question between judges. The only question we have to consider is how this case (the nature of which I will allude to presently) can be tried in the cheapest and best way for both parties.

With respect to the commercial court there is no Act of Parliament establishing such a court; it is a mere piece of convenience in the arrangement of business. The commercial court has no more power to dispense with strict evidence, or to depart from the administration of the law in the ordinary way, than any other judge or Court. The power to dispense with strict evidence depends entirely upon the Judicature Act of 1894 (57 & 58 Vict. c. 16), and the rules which have been made under one of the sections of that Act. The important section is s. 3, which does not specially relate to the commercial court: "It is hereby declared that the power to make rules conferred by the Judicature Acts, 1873 to 1891"—(that means conferred on the Rule Committee)—"includes power to make rules for regulating the means by which particular facts may be proved and the mode in which evidence thereof may be given: (*a*) on any application in

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any matter or proceeding relating to the distribution of any fund or property, whether in court or not; and (*b*), on any application upon summons for directions pursuant to such rules." Under the power given to the Rule Committee by that Act of Parliament certain rules have been made, which are embodied in Order XXX. relating to summonses for directions. Summonses for directions may be taken out before any judge of the High Court. Rule 7, made under the power to which I have first referred, is this: "On the hearing of the summons" (that is, a summons for directions) "the Court or a judge" (that is, any judge of the High Court or any Divisional Court) "may order that evidence of any particular fact, to be specified in the order, shall be given by statement on oath of information and belief, or by production of documents or entries in books, or by copies of documents or entries, or otherwise as the Court or judge may direct." The object of that is, under the powers of the Act of 1894, to dispense to a certain limited extent with the technical rules of evidence. The rules and regulations contained in the notice issued with reference to the commercial court are nothing more than a statement for the guidance of the practitioners in that Court; and they do not go any further than the rule which I have mentioned. It is true that rule 6 of these commercial regulations, as I will call them, is a little differently worded; it runs thus: "Applications may be made to such judge" (that is, the judge of the commercial court) "under the provisions of the Judicature Act, 1894, and the rules thereunder, or by consent, to dispense with the technical rules of evidence for the avoidance of expense and delay which might arise from commissions to take evidence and otherwise." That does not give to the judge of the commercial court any power to do what another judge of the High Court cannot do. They can all do precisely the same thing under the power conferred by the Judicature Act, 1894, and the Rules, and, of course, by consent (where all parties are competent) the technical rules of evidence can be dispensed with.

Having made these preliminary remarks I proceed to consider the real question in this case, namely, what is the best method of trying the present case, having regard to the new practice

which has sprung up as to the trial of commercial cases. I certainly am not prepared to say that every commercial cause ought to be transferred from the Chancery Division to the Queen's Bench Division of the High Court. If in a particular case the Court is satisfied that the judge's having peculiar knowledge of commercial matters and habitual practice in dealing with commercial documents and correspondence between commercial men will greatly facilitate the trial of that particular case, that is a reason for a transfer; but to say that because a case relates to a bill of exchange or to a security on goods or to a bill of lading or stoppage in transitu it ought therefore to go to the commercial court and be transferred for that purpose from the Chancery Division of the High Court, is absurd. As to this particular case I have no hesitation whatever in saying that in my judgment it is exactly one of those which ought to go to the commercial court, for this reason: that whether this will be a long case involving a very exhaustive investigation of accounts or not, depends, to my mind, upon what is done on the summons for directions. If that summons comes before a judge who is not by training and practice specially able to deal with commercial correspondence and commercial views of business, this case may be a very long one. But, on the other hand, if it comes before a judge who is thoroughly versed in that particular department of business and of law, it may be a comparatively short one; and my own suspicion is that it is likely to prove very much shorter than the parties seem to think. That would be an immense gain to both parties, and it appears to me that this case is likely to be tried far better, far more quickly, far more economically, and far more advantageously in every sense if it comes before a judge who has special skill and knowledge as to transactions of this nature, than if it keeps its place in one of the general lists. The case requires the consideration of an enormous amount of mercantile correspondence and great familiarity with commercial business. I think, therefore, that this is a proper case to be transferred to the Queen's Bench Division. Of course the consents of the presidents of the two divisions will have to be obtained in the usual way, and the applicants must pay the costs of those applications and of this appeal.

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LOPES L.J. This is an application to transfer this cause, which is called a "commercial cause," from the Chancery Division into the Queen's Bench Division. It is an application made by the plaintiffs, and it was said, and truly said, that the plaintiffs chose their tribunal in the first instance. That circumstance in general would have some weight with me, but it is to be recollected that at the time this action was brought, no commercial court was in existence, and I am strongly inclined to think that if the commercial court had been in existence the plaintiffs would originally have brought their action in that court.

I wish to say that in determining this matter as we do determine it, I cannot consider for one moment that it is any question between the personality of judges. Everyone must know that there are some judges who are more conversant with certain branches of the law than they are with others. Take, for instance, patent law—there are judges who are specially conversant with that; take company law; take real property law, and others which could be mentioned—some are more conversant with one branch and some are more conversant with another. The question to be decided here is, where can this cause be most effectively, most quickly, and at least expense be tried? I quite agree with what has been said by Lindley L.J. with reference to paragraph 6 in the notice as to the trials of commercial causes. [His Lordship read paragraph 6.] That is not applicable in any special way to any one court more than to another. It is to be observed that the application is to be made "under the provisions of the Judicature Act, 1894, and the rules thereunder," and if the application in any way is outside the Act or those rules I think it would be ultra vires to grant it. All the judges of the High Court stand on the same footing as to the dispensing with technical rules of evidence.

We have now a commercial court established, and the learned judge who has been selected to preside in that court has been selected because he has special knowledge with regard to commercial causes. Now what is this cause? I will not refer to the rule defining commercial causes, because it is admitted on both sides that this is essentially a commercial cause. Mr. Bray

says that the commercial court was only established for the purpose of trying short commercial causes. The phrase he used was, I think, causes which could be "roughly and readily disposed of." I do not agree with that at all. I think the Court was established not only for trying causes that could be quickly disposed of (I do not use the words "roughly and readily"), but that it was established specially to try all difficult commercial cases—cases which might take a long time to try elsewhere, and cases that require special knowledge for their proper determination.

I do not for a moment say it would be right that every cause that might be called a commercial cause should be transferred from the Chancery Division into the Queen's Bench Division for the purpose of having it decided there. There are commercial causes and commercial causes. Every cause must be regarded, when an application of this kind is made, in respect of its particular features and its particular elements, and in each case it is for the Court to determine whether or not in their opinion it would be more effectively, more quickly, and at less expense tried in the commercial court than elsewhere. If the Court arrives at the conclusion that it will in their opinion be better tried in the commercial court, then I think the Court ought to exercise the discretion reposed in it and direct the cause to be transferred to the Queen's Bench Division for the purpose of application being made to the judge of the commercial court for the cause to be tried before him.

RIGBY L.J. I am of the same opinion. In the general principles that have been enunciated by the Lords Justices I entirely agree. With respect to this particular case (and it must be always in respect of the particular case that the decision is arrived at), it appears to me, so far as I can get an insight into the case, which is not quite so complete as that of Lindley L.J., who has heard of this matter before, that there are in it great complications. If those were complications of matters of account, I should be disposed to think the Chancery Division would be a better tribunal for unravelling them than the commercial court; but it seems to me that the complication arises

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from a series of arrangements, not very perfectly understood, it may be, by the parties themselves when they were entered into —some of which were found to be unworkable and had to be supplemented—and other questions of that kind, as to which there is great probability that on an application for directions the judge of the commercial court may be in a position to unravel them himself then and there, or to put matters in a course for early determination. On that ground I think it desirable that this particular case should be sent to the Queen's Bench Division in order that the commercial judge may have the opportunity of taking seisin of it.

Solicitors: *Romer & Haslam, for Farrer-Morgan & Co., Manchester; Clarke, Rawlins & Co.*

H. C. J.

In re BURROWS. CLEGHORN *v.* BURROWS.

CHITTY J.
1895
July 17.

[1895 B. 2000.]

Will—Construction—"Issue" living—Child en ventre sa Mère.

Devise to A. for life, and upon her death to B. "for her absolute use and benefit in case she has issue living at the death of" A., "but in case she has no issue then living" then over.

At the time of the death of A., who survived the testator, B. was enceinte, and the following day was delivered of a living child:—

Held, that B. took absolutely.

Dictum of Lord Eldon in *Thellusson* v. *Woodford* (11 Ves. 112, 149), commenting on the case of *Gulliver* v. *Wickett* (1 Wils. 105), discussed and followed.

SUMMONS to have it declared that upon the true construction of the testator's will and in the events which had happened the plaintiff became absolutely entitled for her separate use to a moiety of the testator's real and personal estate.

John Valentine Burrows by his will, dated October 24, 1893, devised and bequeathed his residuary real and personal estate to his wife Jane Burrows, his son Alfred James Burrows, one of the defendants, and the plaintiff, upon trust to pay the income thereof to his wife for life, and upon her death, as to one moiety, for his son and his issue as therein mentioned, and as to the other moiety, "I give devise and bequeath the same to my daughter Kate Cleghorn" (the plaintiff) "for her absolute use and benefit in case she has issue living at the death of my wife, but in case she has no issue then living" then the testator directed his trustees to pay the income of that moiety to her for her life, and then to her husband for his life, and after his decease he gave the same moiety equally between the children of his son absolutely as tenants in common.

The testator died on November 26, 1894, and his widow died on March 9, 1895. At the time of the widow's death the plaintiff Kate Cleghorn was enceinte, and the day after her mother's death was delivered of a living child.

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The question was whether the plaintiff took absolutely or the gift over took effect.

Mulligan, for the plaintiff. The plaintiff takes absolutely, as the child was en ventre sa mère at its grandmother's death, and is to be taken as a living child.

Gurdon, for the defendants. The term used here is "issue" and not "child," and means that there must be a child born at the time the gift is to take effect. A child en ventre sa mère is only to be treated as a born child where such construction is necessary for the benefit of that child; it is not looked upon as existing for any other purpose: *Blasson* v. *Blasson* (1); Theobald on Wills, 4th ed. p. 259; and in this case the child takes no benefit, and to hold that it is to be taken as a living child is for the mother's benefit only. [He also referred to *Clarke* v. *Blake* (2) and *Doe* v. *Clarke*. (3)]

Mulligan, in reply, referred to *Thellusson* v. *Woodford* (4), and to the hypothetical case stated by Lord Eldon (5), when referring to the case of *Gulliver* v. *Wickett* (6), where the gift was to the child with which the wife was then supposed to be enceinte in fee, provided that if such child should die before twenty-one leaving no issue the reversion should go over, and contended that that was a clear authority that "issue" meant "child," and that the moiety in question was not divested because the child was born after the death of its grandmother.

CHITTY J., after stating the facts, proceeded:—The child was en ventre sa mère at the time of the death of its grandmother, and was plainly then living, so as to bring it within the words of the will "in case she has issue living." But then it is said that the word "issue" imports more than the word "child," and that it means that there must be a child born at the period when the mother is to take; but it appears to me that that distinction between the two words is too refined.

Then it is said that the rule is that the child en ventre sa mère

(1) 2 D. J. & S. 665.
(2) 2 Bro. C. C. 320.
(3) 2 H. Bl. 399.
(4) 11 Ves. 112.
(5) Ibid. 149.
(6) 1 Wils. 105.

is not deemed to be living except where there is a benefit passing directly to the child; and as the mother and not the child in this case takes the benefit, the gift over takes effect. But the question is covered by authority.

In *Thellusson* v. *Woodford* (1) Lord Eldon in his judgment, referring to the case of *Gulliver* v. *Wickett* (2), says (3): "In which case the devise was to a child en ventre sa mère; and to go over, if that child should die under the age of twenty-one, leaving no issue. In the construction of that limitation, expressly to a child en ventre sa mère, suppose, that child had at the age of twenty married, and died six months afterwards leaving his wife enceinte: that property, absolutely given to him, would not be devested, merely because the child was not born till three months after his death." The hypothetical case put by Lord Eldon is exactly this present case, for the second child en ventre sa mère was not to take for his own benefit, but for that of his father, there being a gift over in the event of the first child en ventre sa mère leaving no issue. The opinion of Lord Eldon, as he expressly puts the case of leaving no "issue," extends to this case. In *Thellusson* v. *Woodford* (1) the unanimous opinion of the judges was pronounced by Macdonald C.B., and in the course of it (4), referring to *Gulliver* v. *Wickett* (2), he says: "The devise was to the wife for life, then to the child, with which she was supposed to be enceinte, in fee, provided that, if such child should die before twenty-one leaving no issue, the reversion should go to other persons named. The Court said, if there had been no devise to the wife for life, which made the ulterior estate a contingent remainder, the devise to the child en ventre sa mère, being in futuro, would have been a good executory devise. In *Doe* v. *Lancashire* (5) the Court of King's Bench has held that marriage and the birth of a posthumous child revoke a will, in like manner as if the child had been born in the lifetime of the father. In *Doe* v. *Clarke* (6) Lord Chief Justice Eyre holds that independent of intention an infant en ventre sa mère by the course and order of nature is then living; and comes clearly within the

(1) 11 Ves. 112.
(2) 1 Wils. 105.
(3) 11 Ves. 149.
(4) 11 Ves. 140.
(5) 5 T. R. 49.
(6) 2 H. Bl. 399.

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description of a child living at the parent's decease; and he professes not to accede to the distinction between the cases, in which a provision has been made for children generally, and where the testator has been supposed to mark a personal affection for children, who happened to be actually born at the time of his death." Eyre C.J. at the conclusion of the judgments in *Doe* v. *Clarke* (1) remarked (2): "The two classes of cases in equity proceed on a distinction which has always appeared to me extremely unsatisfactory, and unfit to be the ground of any decision whatever."

It is right that I should notice the case of *Blasson* v. *Blasson* (3), which has been cited. The question there was, as I read the case, on the words "born and living"—words which seem to shew that the testator contrasted birth with life. It was necessary there that the child should be both born and living; and the judgment of the Lord Chancellor is, in my opinion, directed solely to the word "born," and the passages cited by him from the Digest and John Voët relate to born and unborn children, and not to unborn children as living or not. That case, therefore, is clearly distinguishable from the present.

I hold, therefore, that the testator's daughter Kate had issue living at the death of her mother, and that she is therefore absolutely entitled to the moiety given her by the will.

Solicitor: *William Morley, for Dale, Leeds.*

(1) 2 H. Bl. 399. (2) 2 H. Bl. 401.
(3) 2 D. J. & S. 665.

G. M.

CHITTY J.
1895
July 11, 16, 23.

In re FOVEAUX.
CROSS *v.* LONDON ANTI-VIVISECTION SOCIETY.

[1895 F. 598.)

Will—Charity—Power to appoint for "some Charitable Purpose"—Gift to Anti-Vivisection Society.

Societies for the suppression and abolition of vivisection are charities within the legal definition of the term "charity."

Frances Foveaux, by her will dated August 24, 1842, appointed her daughter, Catherine Foveaux, sole executrix and trustee, and gave her the sole management of her money in the public funds for the benefit of herself and her brother, Charles Foveaux, with certain conditions in the will mentioned.

By a codicil, which was undated, the testatrix, after stating that the chief object of her will was to preserve to her daughter the most absolute power, not only over the interest of her (the testatrix's) money for her own and brother's advantage, in equal shares during their lives, but the most uncontrolled right of disposing of the principal from which such interest was derived "for some charitable purpose," provided there existed no such heirs as in the will mentioned, and in default of such, provided neither herself nor her daughter had commenced the particular charity for which they were interested, it was her will that her daughter should either carry on that intention or "will the principal of any moneys after her brother's death either to Hanwell, the Royal Free Hospital, or any other charity"; and in default of such appointment the testatrix directed that on the death of her daughter her money should be divided between the "charities before named"; and added that the amount of her property was 6000*l.* sterling in the 3*l.* 10*s.* per cent. Annuities.

The testatrix, Frances Foveaux, died in January, 1844. Charles Foveaux died in April, 1873.

Catherine Foveaux, by her will dated February 25, 1895, after reciting that she had under the will of her late mother a power of giving and appointing for charitable purposes a sum of 6000*l.*,

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then invested in 2*l.* 15*s.* Consolidated Stock, among divers charitable bequests gave "300*l.* stock each to the Victoria Street, now joined with the International, Society for the Total Suppression of Vivisection, to the London Anti-Vivisection Society, and to the Scottish Society for the Total Suppression of Vivisection," and appointed the plaintiffs executors of her will.

The testatrix, Catherine Foveaux, died in March, 1895.

This was a summons taken out by the executors of the last-named testatrix for the determination of the question whether under the power to appoint among charities, given by the will of Frances Foveaux, the appointment by the will of Catherine Foveaux in favour of the London Anti-Vivisection Society and the Victoria Street and International Society for the Protection of Animals from Vivisection, was valid, the question being whether the same defendants were or were not charities.

Farwell, Q.C., and *William Freeman*, for the plaintiffs.

W. D. Rawlins, for the defendant societies.

Henry Fellows, for the Royal Free Hospital, one of the societies entitled to the residuary estate of the testatrix, Frances Foveaux, in default of appointment.

[The following cases were cited or referred to: *Thornton* v. *Howe* (1); *Attorney-General* v. *Lawes* (2); *Armstrong* v. *Reeves* (3); *Re Joy* (4); *Cocks* v. *Manners* (5); *In re Douglas* (6); *Attorney-General* v. *Whorwood* (7); *Lewis* v. *Fermor* (8); *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (9); *Marsh* v. *Means* (10); *University of London* v. *Yarrow* (11); *Re Vallance.* (12)]

Cur. adv. vult.

July 23. CHITTY J. The question is whether the two defendant anti-vivisection societies are charities in the technical sense in which the term "charity" is used in law. There is a third

(1) 31 Beav. 14.
(2) 8 Hare, 32.
(3) 25 L. R. Ir. 325.
(4) 60 L. T. (N.S.) 175.
(5) L. R. 12 Eq. 574.
(6) 35 Ch. D. 472.
(7) 1 Ves. Sen. 534.
(8) 18 Q. B. D. 532.
(9) [1891] A. C. 531.
(10) 3 Jur. (N.S.) 790.
(11) 1 De G. & J. 72.
(12) Seton, 5th ed. 1141.

society whose objects are apparently similar, and in whose favour a similar gift has been made; but this society is domiciled in Scotland, and could not, according to the existing Rules of Court, be served with the originating summons. They, however, are aware of these prceedings, and are content, as it was stated at the bar, to leave the argument to the two defendant societies.

The question arises in this way. By her will, informal and ill-expressed, but the meaning of which is not difficult to ascertain, Mrs. Foveaux conferred on her daughter Catherine a special power of appointing a fund of personalty in favour of charity. The daughter, Miss Catherine Foveaux, in exercise of this power, has by her will appointed 300*l.* to each of three anti-vivisection societies. Had the daughter made the gifts out of her own personal estate the gifts would have been perfectly valid. The societies are lawful societies. No question of perpetuity would have arisen on the terms of the daughter's will or from the nature of the constitution of the two defendant societies, or, indeed, of the Scottish Society, so far as I am aware of the nature of the constitution of that society. The object of the two societies before the Court is substantially the same—the total suppression of the practice of vivisection. According to the rules of the Victoria Society the object is the total abolition of the practice of vivisection as defined in the report of the Royal Commission, and the action of the society in opposing vivisection rests upon moral grounds; other considerations are to be taken into account subordinately only (rules 1 and 2). The object of the London Anti-Vivisection Society is declared by its rules to be to secure the total abolition of the practice commonly called vivisection. Should it ever be desirable, either from its object having been attained or from other reasons, to dissolve the society, its general surplus property is to be applied for the benefit of the animal creation in such manner as the general committee shall determine (rules 1, 19). In determining this question of charity the Court does not enter into or pronounce any opinion on the merits of the controversy which subsists between the supporters and opponents of the practice of vivisection. It stands neutral. Humane men and women of a high order of intelligence and education are found in the ranks

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on either side. Stated broadly, one side holds that the practice under carefully guarded provisions, although it may inflict some suffering on the lower order of animals, is justifiable and tends to promote the welfare of the human race and also of the lower order of animals in general. They have the Act of Parliament in their favour (39 & 40 Vict. c. 77). On the other hand, the anti-vivisectionists hold that the practice is wholly unjustifiable. The repeal of the Act of Parliament is undoubtedly part of their object; it is not, however, confined to this, but extends to the total suppression of what the members of the societies consider to be a cruel and immoral practice. The element of morality and the improvement of morality from their point of view must, I think, be taken to be involved in their object.

Cases arise, such as the present, in which it is not easy to ascertain whether a particular institution is or is not a charity. Charity in law is a highly technical term. The method employed by the Court is to consider the enumeration of charities in the Statute of Elizabeth, bearing in mind that the enumeration is not exhaustive. Institutions whose objects are analogous to those mentioned in the statute are admitted to be charities; and, again, institutions which are analogous to those already admitted by reported decisions are held to be charities. The pursuit of these analogies obviously requires caution and circumspection. After all, the best that can be done is to consider each case as it arises, upon its own special circumstances. To be a charity there must be some public purpose—something tending to the benefit of the community. The benefit in point of local area need not extend to the public at large; a trust for the benefit of the inhabitants of a particular district will suffice. In *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (1) Lord Macnaghten said that charity, in its legal sense, comprises four principal divisions—trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads. In examining the purposes of any particular trust the Court has taken a liberal rather than a narrow view of the subject. Under the head of the advancement

(1) [1891] A. C. 531, 583.

of religion the Court has not confined itself to the advancement of the tenets of the Church as established by law; it has held trusts for the promotion of many diverse forms of the Christian religion to be valid charities. A strong illustration of this is to be found in *Thornton* v. *Howe*. (1) Sir John Romilly held there that a trust for the publication of the works of Joanna Southcott was a valid charity. He found that her works were not immoral or subversive of religion, although he found in them much that was very foolish, and, although he said that they were in a great measure incoherent and confused, he considered that they were written with a view to extend the influence of Christianity—i.e., the advancement of religion. This was the ground on which he based his decision. He did not think that it was incumbent on him to say that religion would in fact, or according to his own judgment, be advanced. He looked to the view or purpose of the writer. Again, take the head of relief of poverty. Dole charities were greatly in favour with our ancestors. Modern experience, regard being had to the increase of population, change of residence, and other altered circumstances, has shewn that such charities tend to pauperize a district, and are not beneficial; and in framing new schemes the Court, having within the limits of judicial discretion to express its own views on the question, sets itself against this form of charity. Yet undeniably a dole charity if created at the present day is a valid charity.

I proceed to deal with the authorities more particularly bearing on the present question. In *University of London* v. *Yarrow* (2) it was held that a bequest for establishing an institution for investigating, studying, and curing maladies, distemper, and injuries to which any quadrupeds or birds useful to man might be found subject was charitable. It was part of the testator's bequest that kindness to the animals committed to the charge of the superintendent of the institution should be a general principle of the institution. Lord Cranworth thought that by animals or birds useful to mankind domestic animals were meant; but if a more expansive meaning ought to be attributed he would not at all say that the charity would be

(1) 31 Beav. 14. (2) 1 De G. & J. 72.

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bad. In *Marsh* v. *Means* (1) Wood V.-C. appears to have considered that if the gift had been for supporting the objects and principles enunciated in the prospectus published in 'The Voice of Humanity' there would have been a good charity. Stated generally, the main object was to prevent cruelty to animals, and the animals intended to be protected were not merely domestic animals. In *Re Vallance* (2) a society to promote prosecution for cruelty to animals was deemed charitable. In *In re Douglas* (3) Kay J. considered that gifts to the Royal Society for the Prevention of Cruelty to Animals and the Society for the Protection of Animals liable to Vivisection and to the Home for Lost Dogs were all charitable. On the appeal Lindley L.J. was of the same opinion; but he declined to express any opinion one way or the other whether "The International Society for the Total Suppression of Vivisection," in its then present shape, was as good an object for a charitable bequest as it had been before its constitution had been altered, and Bowen L.J. expressly reserved this question for future consideration. In *Re Joy* (4) there was a gift in favour of a society which the testatrix described as "The Society for Suppressing Cruelty by United Prayer." My decision was that there was no such society in existence at the time of the testatrix's death; that, in substance, the lady herself was the society, if it ever existed; and that the society, assuming that it continued to exist until her death, at all events died with her; and that no general charitable intent was manifested. The question whether an anti-vivisection society was a charity was discussed but was not decided. In *Armstrong* v. *Reeves* (5) the Vice-Chancellor of Ireland held that legacies to two societies, the objects of which were the suppression of vivisection, were charitable legacies. In opposition to the claim of the defendant societies, it was argued that the Vice-Chancellor took an erroneous view of the effect of the authorities he referred to; but, however this may be, the Vice-Chancellor clearly expressed his own opinion on the subject apart from *Re Joy* (4), and *In re Douglas*. (3) Again, it was urged that, having decided that

(1) 3 Jur. (N.S.) 790.
(2) Seton, 5th ed. 1141.
(3) 35 Ch. D. 472.
(4) 60 L. T. (N.S.) 175.
(5) 25 L. R. Ir. 325.

there was no perpetuity, it became unnecessary for the Vice-Chancellor to consider the question of charity. But the Vice-Chancellor considered this question on the assumption that there was a perpetuity, and the conclusion at which he arrived cannot be treated as a mere dictum: it was part of his decision. Now, although the judgment does not bind me as an authority, still I ought to treat it with the respect due to the learned Vice-Chancellor of Ireland. In *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (1) the present Lord Chancellor refers to the purposes of anti-vivisection societies as being comprehended in England within the term "charitable purposes."

The result appears to me to be this. There is a balance of judicial opinion in favour of the defendant societies; there is no express authority against them. On principle, if a society for the prevention of cruelty to animals is a charitable society, it would seem to follow that an institution for the prevention of a particular form of cruelty to animals is also charitable. The mere infliction of pain is not necessarily cruelty; into the question of what is cruelty the moral element largely enters: *Lewis* v. *Fermor*. (2) It may be truly said that the infliction of justifiable pain is not cruelty. The question of what is and what is not justifiable is a question of morals, on which men's minds may reasonably differ and do in fact differ. Cruelty is degrading to man; and a society for the suppression of cruelty to the lower animals, whether domestic or not, has for its object, not merely the protection of the animals themselves, but the advancement of morals and education among men. The purpose of these societies, whether they are right or wrong in the opinions they hold, is charitable in the legal sense of the term. The intention is to benefit the community; whether, if they achieved their object, the community would, in fact, be benefited is a question on which I think the Court is not required to express an opinion. The defendant societies may be near the border line, but I think they are charities.

Solicitors: *King & McMillin; F. Cotton; Hyde, Tandy, Mahon & Sayer.*

(1) [1891] A. C. 531, 550. (2) 18 Q. B. D. 532.

G. M.

NORTH J. 1895 June 15, 22, 25,

PEGGE *v.* NEATH DISTRICT TRAMWAYS COMPANY.

[1894 P. 2426.]

Public Undertaking—Penalty—Distress—Tramways Act, 1870 (33 & 34 *Vict. c.* 78), *ss.* 28, 56.

The principle of *Gardner* v. *London, Chatham and Dover Ry. Co.* (L. R. 2 Ch. 201) does not prevent the levying by distress of penalties imposed on a tramway company for non-repair of their rails.

THIS was a debenture-holder's action in which an order was made on October 3, 1894, by the vacation judge appointing a receiver and manager of the undertaking of the defendant company. Judgment was given in the action on January 12, 1895, continuing the receiver and manager. The debentures, in respect of which the action was brought, charged the repayment of the principal and interest secured upon "the undertaking, lands, houses, stables, plant, property, and effects both present and future of the company."

The defendant company was formed in 1873, under a Provisional Order of the Board of Trade, made in pursuance of the Tramways Act, 1870, duly confirmed by a Tramways Orders Confirmation Act, 1873 (36 & 37 Vict. c. cxcvii.).

Clause 8 of the Provisional Order provided: "The promoters shall at all times maintain and keep in good condition and repair the rails of which any of the tramways shall for the time being consist, and if the promoters at any time fail to comply with this provision or with any of the requirements of s. 28 of the Tramways Act, 1870, they shall be subject to a penalty not exceeding 5*l.* for every day on which such act of omission continues; and such penalty may be recovered as by clause 56 of the said Act is provided."

Sects. 28 and 56 of the Tramways Act, 1870, are as follows:—

Sect. 28: "The promoters shall, at their own expense, at all times maintain and keep in good condition and repair, with such materials and in such manner as the road authority shall direct, and to their satisfaction, so much of any road whereon any tramway belonging to them is laid as lies between the rails of the

tramways and (where two tramways are laid by the same promoters in any road at a distance of not more than 4 ft. from each other) the portion of the road between the tramways, and in every case so much of the road as extends 18 in. beyond the rails of and on each side of any such tramway. . . ."

Sect. 56: "All tolls, penalties, and charges under this Act, or under any bye-law made in pursuance of this Act, may be recovered and enforced as follows:—In England before two justices of the peace in manner directed by the Act 11 & 12 Vict. c. 43, and any Act amending the same. . . ."

On February 8, 1895, an order was made at the instance of the Glamorganshire County Council by the Court of petty sessions for the Neath division of the county of Glamorgan on the defendant tramway company to pay penalties and costs to the amount of 435*l.* 11*s.* 6*d.* in respect of neglect in keeping their tramways in repair. This was a summons by the Glamorganshire County Council for liberty, notwithstanding the appointment of a receiver and manager, to distrain for the penalties upon the goods, chattels and effects of the defendant company for the sum of 435*l.* 11*s.* 6*d.* penalties and costs above mentioned.

During the argument it was agreed that the Court should decide between the parties as to whether, if there had been no appointment of a receiver and manager of the undertaking, the sheriff could properly take the goods and chattels of the tramway company in execution under a warrant to distrain.

Vernon Smith, Q.C., and *J. G. Wood*, for the summons. The order for the appointment of a receiver and manager of the tramway was wrong, as has now been held by the Court of Appeal: *Marshall* v. *South Staffordshire Tramways Co.* (1); *Blaker* v. *Herts and Essex Waterworks Co.* (2); but, as the order was made, and the manager, an officer of the Court has possession, it is necessary to apply for leave to enforce the penalties by distress.

The foundation of the decision of *Gardner* v. *London, Chatham and Dover Ry. Co.* (3) does not touch the right of a person who has obtained an order for penalties to levy those penalties by distress.

(1) [1895] 2 Ch. 36. (2) 41 Ch. D. 399. (3) L. R. 2 Ch. 201.

NORTH J. 1895 PEGGE v. NEATH DISTRICT TRAMWAYS COMPANY.

The Tramways Act, 1870 (33 & 34 Vict. c. 78), coupled with the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), which has taken the place of the Act of 1848 (11 & 12 Vict. c. 43), give express statutory power to levy the penalties, which are imposed for the protection of the public and in order to keep the tramway itself in order. The very object of the power to distrain for penalties is to compel the undertakers to perform their duty to the public and keep the tramway in good order as a going concern.

Ashton Cross, for the debenture-holders and the tramways company. The appointment of a receiver and manager was proper. It stands as a good appointment; the rights of the debenture-holders under that appointment will not be taken away. The right of the debenture-holders to the chattels attached when the order appointing a receiver and manager was made: *Taunton* v. *Sheriff of Warwickshire*. (1)

The county council, who have got a magistrate's order for penalties, are in no better position than a person who has obtained judgment in a superior court. The same principle that prevents chattels belonging to a public undertaking being taken in execution prevents them being distrained upon: *Legg* v. *Mathieson*. (2)

Vernon Smith, Q.C., in reply. The county council were not parties to the action, and are not bound by the order made in it, which turns out to have been wrong.

June 25. NORTH J. (after stating the facts). The order of the Court of petty sessions has been made; but there is a difficulty about enforcing it because of the order made in the present action appointing a receiver and manager. The Court having appointed a receiver and manager, it is quite clear that there can be no distress upon the property of the company within the scope of that receiver and manager's duties without the leave of the Court, otherwise there would be a contempt.

The result, therefore, is that the application now is made by the county council for leave, notwithstanding the appointment of a receiver, to exercise their right of distraining. Now that is objected to by the debenture-holders, and it is necessary to see

(1) [1895] 1 Ch. 734; 2 Ch. 319. (2) 2 Giff. 71.

what their position is. [His Lordship read extracts from the judgment of Lord Cairns in *Gardner* v. *London, Chatham and Dover Ry. Co.* (1), and continued:—]

Let me remark at this stage that what was charged by the debentures in that case was "the undertaking"; but in my opinion the words of charge contained in the present debentures really mean the same thing. The operative words begin by charging "the undertaking." Then certain details which are included in it are mentioned, but that, in my opinion, does not alter the effect of its being a general charge on the undertaking.

Gardner's Case (1), as is well known, related to a railway company, and the Courts have, to some extent, regarded a tramway company as in a different position. There is a power contained in the Tramways Act to sell a tramway with the consent of the Board of Trade, while there is no such power in the case of a railway. The order appointing a receiver and manager made by the vacation judge in this case merely followed other orders made by other judges to a similar effect in similar cases. There has been no appeal from that order; but the question whether there is jurisdiction to make such an order has in the meantime been decided with respect to a tramways company by the Court of Appeal in the case of *Marshall* v. *South Staffordshire Tramways Co.* (2) There it was decided that the rule laid down as to a railway company in *Gardner's Case* (1) applies to a tramway company also, overruling certain decisions to the contrary effect. [After reading extracts from the report of that case (2), his Lordship proceeded:—]

The principle of *Gardner's Case* (1) applies to all tramway companies governed by the Tramways Act of 1870, whether the promoters are local authorities or private individuals or companies formed under the Companies Act, 1862, or companies created by special Act of Parliament. It is clear, therefore, that according to that decision in the case of such a tramway company as the present, a receiver and manager such as was appointed in this case ought not to have been appointed. A special receiver of the tolls might have been appointed, but that is a different matter altogether.

(1) L. R. 2 Ch. 201. (2) [1895] 2 Ch. 36.

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The order made in this action by the vacation judge has not been the subject of appeal, and therefore it is binding upon the parties to it; but the county council are not parties to the action nor represented in it, and they are not bound by that decision. It is open to them to say that, notwithstanding that the receiver and manager has been appointed in very large terms, they are not affected by it. Of course they are affected to the limited extent that, there being an officer of the Court in possession, they cannot touch the property which he holds without the leave of the Court. But they get over that difficulty by coming here for leave to distrain. It is a case, therefore, in which the debenture-holders have not, in my opinion, as against the county council any right by reason of there having been a receiver and manager appointed in this action. It follows, therefore, that I must give the county council leave to exercise their power of distress notwithstanding the appointment of the receiver.

But then counsel on both sides asked me to decide what the rights would be under the power to distrain; and Mr. Cross pointed out that if in point of fact there is power to distrain and sell what is distrained, the very difficulty will arise that the public convenience arising from the existence of a tramway will be impaired and interfered with. He says, that if part of the rolling stock is seized and sold, the use of the tramway for public purposes will, in Lindley L.J.'s words, be defeated, or at all events seriously affected; and so far as the public are concerned, they will be equally affected by a sale, whether the sale is made by debenture-holders or by anybody else. But to that observation I think two remarks apply. In the first place the cases that I have referred to are dealing with the power of debenture-holders. The Glamorgan County Council do not stand in the position of the debenture-holders or anything like it. Their powers are express statutory powers given to them by the Tramways Act of 1870, and the Provisional Order relating to their own tramway, confirmed by Parliament in 1873. It is not a question, therefore, of the company handing over its property to its creditors. It is a case of a body whom the legislature recognizes as having a right to distrain, and in my opinion I cannot interfere with that right. There is this further

observation to be made: the argument that the property comprised in the undertaking of the tramway must not, in the interest of the public, be interfered with, really has not any application. The Provisional Order provides that the promoters shall at all times maintain and keep in good condition and repair the rails of which any of the tramways shall for the time being consist, and this power of distress is expressly conferred for the purpose of compelling the promoters as far as they can be compelled to maintain and keep in good condition and repair the lines of the tramway. If that is neglected the public convenience will be sacrificed entirely, because if the rails are not safe they cannot possibly be used by the public. This power, therefore, which is given here is really a power, not of doing something that will interfere with public convenience, but a power given for the purpose of securing public convenience in the best way. It is a case, therefore, in which the exercise of the power will not defeat any such purpose of giving rights to the public as Lord Cairns referred to in *Gardner's Case.* (1)

In my opinion, therefore, the Glamorgan County Council must have leave to distrain, notwithstanding the order made in this action, and, in my opinion, they are entitled to exercise the power of distress without any interference by, and notwithstanding the claim of the debenture-holders of the company. I have not said anything as to how they can sell. I think their rights in that respect are regulated by the statute. The statute of 1879, it is suggested, repealed the earlier Act. That Act is altered, no doubt, and varied to a considerable extent; but I do not find that it is repealed. The 43rd section of the Act of 1879 says, "the following regulations shall be enacted with respect to warrants of distress issued by a Court of summary jurisdiction." Then it proceeds to lay down the way in which they are to be executed, and of course the county council must proceed in accordance with the Act of Parliament.

Solicitors for county council: *Helder, Roberts, Son & Walton, for Morgan & David, Neath.*

Solicitor for plaintiff: *Charles Everett.*

(1) L. R. 2 Ch. 201.

D. P.

NORTH J.
1895
May 22;
June 29.

EAST STONEHOUSE LOCAL BOARD *v.* VICTORIA BREWERY COMPANY.

[1893 E. 1189.]

Practice—Costs—Attendance of Witnesses—Rules of Supreme Court, 1883, *Order* LXV., *r.* 27, *sub-rr.* 9, 37.

Allowances to witnesses for hotel expenses on attendance at the trial are in the discretion of the taxing master; and are not regulated by the scale of 1853.

THIS was an action for damages occasioned by contamination of water, in which judgment was given for the plaintiffs for 83*l.*, with costs. The plaintiffs' costs had been taxed, and the defendants took out a summons to review the taxation. The defendants objected, among other items, to the allowance of the hotel expenses of eleven witnesses who attended in court for the purpose of the trial for eight days on behalf of the plaintiffs. The taxing master allowed for one witness the following payments: Attendance as witness, 8*l.* 8*s.*; Sunday, 10*s.* 6*d.*; hotel expenses, nine days, 9*l.* 9*s.*; railway fare and cab fare, 4*l.* The allowances in respect of the other witnesses were of a similar character.

Swinfen Eady, Q.C., and *Manby*, for the defendants. Under Order LXV., r. 27, sub-r. 37, the same allowances are to be made for attendance of witnesses as would have been made before the passing of the Judicature Act, 1873. There was at that time a scale fixed by the judges of the Common Law Courts in 1853: The Annual Practice, 1895, vol. ii. p. 204. The practice in equity followed the practice at common law in this respect: *Nokes* v. *Gibbon* (1); *Clark* v. *Gill* (2); *Brocas* v. *Lloyd* (3); *Smith* v. *Buller*. (4)

The master's allowances are in excess of those given by the scale of 1853; they ought to be cut down to the scale allowances.

Younger, for the plaintiffs. By Order LXV., r. 27, sub-r. 9,

(1) 26 L. J. (Ch.) 208.
(2) 1 K. & J. 19.
(3) 23 Beav. 129.
(4) L. R. 19 Eq. 473.

the allowances to witnesses attending the trial is placed within the discretion of the taxing master. It has been so held in the case of a common law action: *Turnbull* v. *Janson*. (1)

Swinfen Eady, Q.C., in reply. *Turnbull* v. *Janson* (1) only applied to scientific witnesses.

June 29. NORTH J. (after deciding other points in favour of the respondents). There might have been a question whether the scale settled by the common law judges in 1853 as to the allowances to witnesses attending a trial was to be applied by the taxing master, but for the fact that it has been decided that, under rules the same as those now in force, the scale has not the authority it had. [His Lordship referred to Order LXV., r. 27, sub-rr. 9, 20, 37, and 38, and proceeded:—] These are the important rules bearing on the matter. It has already been decided by the Court that the effect of those rules is to supersede the scale altogether, and that the scale is no longer binding. In the case I refer to, *Turnbull* v. *Janson* (1), the Court so decided as to allowances to scientific witnesses, to which certainly the old scale of 1853 would have applied unless the rules of 1875 as to special allowances then in force had got rid of it, were not regulated thereby. The rules of August, 1875, rr. 8 and 28, correspond with sub-rules 9 and 37 of the existing rule 27.

As to allowances for attendance of witnesses at the trial, Lindley J. says (2): "The master admits that he did not exercise any discretion, but that he taxed the charges upon the notion that he was bound by the scale of allowances of 1853, and allowed the scientific witnesses at the rate of one guinea per day only. I think that is a matter of principle. To hold that the scale allowance of one guinea is to be adhered to is to ignore the 8th rule of the 'Special Allowance, 1875,' altogether. The bill must go back to the master to exercise his discretion in that respect."

Then Lopes J. says (3): "The fourth" item sought to be reviewed "involves a question of principle, and the construction of the rules of 1875 as to Special Allowances, viz. the allowance

(1) 3 C. P. D. 264. (2) 3 C. P. D. 270.
(3) 3 C. P. D. 271.

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for the attendance of witnesses in Court. Rule 8" (that is, sub-rule 9 of the present rule) "expressly enables the master to allow such just and reasonable expenses as appear to have been properly incurred in procuring the attendance of witnesses. The master appears to have considered himself bound by the scale of 1853 as a hard and fast rule. In that, having regard to rule 8, I think he was wrong. On the part of the plaintiff, reliance was placed upon rule 28. The 8th rule, however, appears to me to be inconsistent with that. The matter must therefore go back to the master for reconsideration."

That case seems to me clearly to settle that the master had a discretion, and it was for him (considering the existing rules) to say what in his discretion ought to be allowed; and as he is right in principle it is not for me to go into details as to the amount that ought to be allowed. Had I been the taxing master, I probably should not have allowed the expenses of bringing from Plymouth to London, and keeping here for nine days, a witness merely required to prove some photographs, unless the defendants had first been asked to make the necessary admissions, and had refused to do so.

Solicitors: *Wedlake, Letts & Wedlake, for Batchelor & Geake, Plymouth; Crowders & Vizard, for Rodd, East Stonehouse.*

D. P.

In re DE HOGHTON.
DE HOGHTON *v.* DE HOGHTON.

[1876 D. 229.]

STIRLING J.
1895
June 15, 19.

Revenue—Legacy Duty—Annuity out of Rents of Realty—Trust for Accumulation of Surplus Rents—Annuitant Tenant for Life subject thereto—Legacy Duty Act, 1845 (8 & 9 *Vict. c.* 76), *s.* 4.

A testator devised real estate to trustees for a term of 500 years, and subject thereto on limitations under which A. became tenant for life. The trusts of the term were to raise and pay out of the rents and profits of the estate an annuity to the person who should (subject to the term) be entitled to the rents and profits; and the testator declared that, subject thereto, the trustees should during twenty-one years from the testator's death accumulate the rents and profits and invest them in land to be settled to the same uses; and, after the determination of the twenty-one years, should pay the rents and profits to the person for the time being entitled to the hereditaments comprised in the term :—

Held, that as A., during the period of twenty-one years, had in effect a mere charge upon the estate of another person, legacy duty, and not succession duty, was payable on the annuity.

Attorney-General v. *Jackson* (2 Cr. & J. 101) and *Shirley* v. *Earl Ferrers* (1 Ph. 167) considered.

PETITION.

Sir Henry de Hoghton, Bart., who died on December 2, 1876, by his will, dated February 9, 1875, gave, devised, and appointed all his real estates being freeholds of inheritance unto Charles de Hoghton, Richard de Hoghton, and Richard John Flowerdew, their heirs and assigns, to the use of the said C. de Hoghton, R. de Hoghton, and R. J. Flowerdew, their executors, administrators, and assigns, for the term of 500 years from his death, without impeachment of waste upon the trusts, and with the powers thereinafter declared, and subject thereto (after certain intermediate limitations in strict settlement which had determined or failed) to the use of the petitioner Sir James de Hoghton and his assigns for life, without impeachment of waste, with remainder to the use of his first and every other son successively in tail male, with divers remainders over. And the testator declared that the premises were limited to the said

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trustees for the term of 500 years upon trust by and out of the rents and profits of the hereditaments comprised therein to raise and pay as therein mentioned the annuities or annual sums for the time being payable under his will or any codicil thereto, and in particular to "raise and pay to the person who for the time being shall (subject to the said term of 500 years) be entitled under this my will to the possession or receipt of the rents and profits of my said devised estates, provided that such person if a male shall be above the age of twenty-one years, or if a female shall be above the age of twenty-one years, or have married, the annuity following according to the age of the recipient, that is to say, if and while the recipient is under the age of twenty-five years, 1000*l.*; and if and while between the ages of twenty-five and thirty years, 2000*l.*; and if and when above the age of thirty years, 3000*l.*; the annuity of such person, if a married woman, to be paid to her for her sole and separate use without power of anticipation." And the said testator further declared that, subject to the trust thereinbefore declared, and to the costs and expenses of the trustees as therein mentioned, the trustees should during the period of twenty-one years from his death accumulate the rents and profits arising from the hereditaments and premises comprised in the said term, as therein more particularly mentioned, and apply the same, with the accumulations, upon the trusts and subject to the powers, provisoes, and declarations thereinafter contained of and concerning the moneys to arise from a sale in pursuance of the powers of sale thereinafter contained; and after the determination of the said period of twenty-one years, subject as aforesaid, should pay the rents and profits to the person or persons for the time being entitled to the said hereditaments and premises comprised in the said term in reversion expectant upon the said term. The testator then empowered his trustees to sell all or any part of the hereditaments subject to the limitations of his will, and to invest the sale moneys in the purchase of land to be settled to the uses and upon the trusts of his will.

On April 12, 1893, the petitioner, Sir James de Hoghton, succeeded to the baronetcy, and under the trusts of the testator's will became entitled to an annuity of 3000*l.* a year out of the

rents and profits of the hereditaments comprised in the term of 500 years for the residue of the period of twenty-one years from the testator's death, which would not expire until December, 1897.

The rents and profits of the estate comprised in the terms were largely in excess of the amount required for the annuities given by the will; no duty had as yet been paid in respect of Sir James de Hoghton's annuity, and in an action for the administration of the testator's estate, which had been revived by Sir James, he and the trustees of the will presented this petition in order to have the question whether legacy duty or succession duty was payable, determined by the Court.

Hastings, Q.C., and *Ingle Joyce*, for the petitioner. We contend that legacy duty and not succession duty is payable upon the annuity.

By the Legacy Duty Act of 1805 (45 Geo. 3, c. 28), s. 4, every gift by will charged upon or made payable out of any real estate of the deceased, whether given by way of annuity or in any other form, was to be taken to be a legacy within the meaning of the Act. This section was considered in *Attorney-General* v. *Jackson* (1), and it was held that an annuity or yearly rent-charge given by a testator out of his real estate (which was devised to other people) with a power of distress and entry fell precisely within this section, and consequently that legacy duty was payable thereon. This decision was followed in *Stow* v. *Davenport* (2); it has been acted on ever since, and it governs the present case, because the enactment in s. 4 of the Act of 1805 is in substance re-enacted in the 4th section of the Legacy Duty Act of 1845 (8 & 9 Vict. c. 76).

It may be said, however, that the decision in *Shirley* v. *Earl Ferrers* (3) qualifies the rule laid down in *Attorney-General* v. *Jackson* (1), and shews that legacy duty is not payable. But the ground of the decision in *Shirley* v. *Earl Ferrers* (3) was that Caroline Shirley herself was the owner of the life estate out of which the yearly amounts applicable for her maintenance

(1) 2 Cr. & J. 101. (2) 5 B. & Ad. 359.
(3) 1 Ph. 167.

STIRLING J. were to be paid, and Lord Lyndhurst L.C. said: "Nothing but what is a charge upon the estate of another person will come within the statute." But this is a different case altogether. Here the annuitant is not the owner of the life estate out of which the annuity comes, because during the whole period that the annuity subsists, i.e. until December 2, 1897, the rents and profits are (subject to the annuity) to be accumulated and invested, and it is not until the annuity has ceased that he becomes tenant for life.

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Buckley, Q.C., and *Methold*, for some, and *Rowden*, for others of the remaindermen, took no part in the argument.

Vaughan Hawkins, for the Commissioners of Inland Revenue. *Shirley* v. *Earl Ferrers* (1) has been law for fifty years, and a broad view must be taken of the Legacy Duty Acts as interpreted by that decision. Sir James de Hoghton is the owner of the life estate in these settled lands, within the meaning of Lord Lyndhurst's judgment in that case. There is, it is true, a charge, which for a limited period takes away from him all the rents and profits except a certain sum, but he is owner of the life estate all the same. Who else can be said to be owner of the life estate? A person who is tenant for life does not in substance cease to be owner of the life estate, because for a limited period his ownership is qualified for the purpose of increasing the bulk of the estate. The question is not whether for the time being he is entitled to the surplus rents, but whether he is not in fact the owner of an estate with something taken out of it. I contend that in substance he is the owner of an estate with something taken out of it, and that the estate out of which the thing is to come is nevertheless his estate. No distinction can be drawn between this case and *Shirley* v. *Earl Ferrers* (1), for according to the arguments used in this case Caroline Shirley herself was not the owner of the estate during the period when the portion of rents and profits in question were to be applied by the trustees to her maintenance and education. She might have died before twenty-one or marriage, and during the period of that contingency the question was the same as in the present case. I rely accordingly

(1) 1 Ph. 167.

upon *Shirley* v. *Earl Ferrers* (1), and say that, looking not at the mere form adopted by the conveyancer but at the substance of the provision, the effect is the same as if the testator had given Sir James a life estate, and had directed that for a limited period he should only have part of the rents; and accordingly that succession duty is payable upon this annuity.

Hastings, Q.C., in reply.

Cur. adv. vult.

June 19. STIRLING J. The statute on which the question in this case depends is 8 & 9 Vict. c. 76, s. 4; that is itself a re-enactment with certain extensions of a similar clause contained in the Act of 45 Geo. 3, c. 28; and that again was a re-enactment with extensions of a clause contained in 36 Geo. 3, c. 52. Reading the Act now in force shortly, it runs thus: "Every gift by any will . . . which . . . is or shall be payable, or shall have effect or be satisfied out of . . . or is or shall be charged or rendered a burden upon the real or heritable estate of such person or any real or heritable estate, or the rents or profits thereof . . . whether such gift shall be by way of annuity or in any other form . . . shall be deemed a legacy within the meaning of the Legacy Duty Acts."

Now, the corresponding clause in the Act of 45 Geo. 3 (which does not materially differ) was considered by the Court of Exchequer in the case of *Attorney-General* v. *Jackson*. (2) There a testator gave a life estate in his freehold property to C. P., and, after her decease, and in the event of her husband J. P. surviving her, he gave him an "annuity or yearly rent-charge" of 500*l.* payable quarterly, "with such power and remedy of distress and entry, and perception of rents, in case the annuity should be in arrear, as are reserved to lessors for the recovery of rents on leases for years"; and, subject to that annuity, he gave his real estates in moieties to R. J. in fee, and to W. J. for life. And it was held that legacy duty was payable upon this devise to J. P. The judgment was delivered by Lord Lyndhurst, then Lord Chief Baron, and he said (3): "It appears to us, that

(1) 1 Ph. 167.
(2) 2 Cr. & J. 101.
(3) 2 Cr. & J. 116.

STIRLING J. this clause comes precisely within the terms made use of by the legislature—a gift by way of annuity out of or charged upon his or her real estate."

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The same point was considered by the Court of King's Bench in *Stow* v. *Davenport* (1), where the decision in *Attorney-General* v. *Jackson* (2) was followed. But in the case of *Shirley* v. *Earl Ferrers* (3), a decision was given which is said to qualify the rule laid down in *Attorney-General* v. *Jackson.* (2) In *Shirley* v. *Earl Ferrers* (3), a testator devised certain estates to the use of trustees for the term of 500 years, and subject thereto, to the use of other trustees, to preserve contingent remainders, with remainder to the first and other sons of Caroline Shirley (then an infant), with divers remainders over; and he directed that the trustees of the term should, after paying certain annuities, apply so much of the rents and profits of the estates as they should think fit (not exceeding in any one year a certain amount), in aid of another fund, to the maintenance and education of Caroline Shirley until she should attain twenty-one or marry; and that they should accumulate the surplus rents and profits for the benefit of Caroline Shirley when she should attain twenty-one or marry; and if she should die under twenty-one and unmarried, then for the benefit of the parties entitled under the subsequent limitations of the estates; and that upon her attaining twenty-one or marrying, they should, during her lifetime, pay the surplus rents, after payment of the annuities, to her for her separate use. And it was held, that the sums annually applied out of the rents and profits, under the trusts of the term, to the maintenance and education of Caroline Shirley until her marriage, were not liable to legacy duty. The decision was that of Lord Lyndhurst himself who was then Lord Chancellor, and the case of *Attorney-General* v. *Jackson* (2) was cited. His Lordship said in giving judgment (4): "The effect of the will is to give the petitioner a life estate subject to certain charges, and coupled with a direction to the trustees to apply a limited portion of the rents to her maintenance and education until she attain the age of twenty-one or marry. The direction

(1) 5 B. & Ad. 359.
(2) 2 Cr. & J. 101.
(3) 1 Ph. 167.
(4) Ibid. 171.

merely does what this Court would have done without it. The petitioner would have been entitled at all events to maintenance out of the rents and profits of the real estates. It is true, the trustees have a discretion to allow a portion of the rents, not exceeding a certain amount, for that purpose; but still the estate out of which the allowance is to come is her estate. Nothing but what is a charge upon the estate of another person will come within the statute. It is very important that, as far as possible, we should avoid refinements in the construction of this Act. I am of opinion that no legacy duty is payable."

Now, that case is relied upon by the Crown in the present case. It is said, and I think truly said, that two principles are laid down or implied in the judgment of Lord Lyndhurst, first, that in considering the nature of the interests created by a will or other instrument for the purposes of these Acts, the substance of the thing is to be looked at, and not the mere conveyancing form; and secondly, that an annuity within the meaning of 8 & 9 Vict. c. 76, s. 4, must be a charge upon the estate of another person, and not merely a portion of the estate of the same person. I propose to apply those two principles to the present case, and to consider whether in substance what is given to Sir James de Hoghton during the period of twenty-one years from the death of the testator is or is not a charge upon the estate of another person. Now let us proceed by steps. If the trust had been, during the period of twenty-one years, to pay Sir James de Hoghton a sum of 3000*l.*, and to pay the residue of the rents and profits to a person whom we may call A., and then, subject to the term, to a third person whom we may call B., for life with remainders over; then it seems to me plain that the case would have fallen within the decision in *Attorney-General* v. *Jackson*. (1) Does it then make any difference that the person whom I have named B. in this case is Sir James de Hoghton himself? I cannot see that it does. During the period of twenty-one years he does not take the income; he merely takes a portion of the income and the residue of the income is given away to another person A., and, therefore, during

(1) 2 Cr. & J. 101.

STIRLING J. that period the annuity is charged upon the estate or interest of A.

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Next I have to consider whether it makes any difference that in this case the person whom I have designated A. is a trustee directed to lay out the surplus rents in the purchase of other lands to be settled to the same uses. I again say that that makes no difference in substance. The surplus rents do not during the period of twenty-one years belong to Sir James de Hoghton. It is possible that if he survives the period he may take an interest, not in those rents, but in the income to arise from the investments of them; if however he dies during the period, then he will have no interest whatever. It seems to me that, to all intents and purposes, during the period of twenty-one years, Sir James de Hoghton has a mere charge upon these rents which go beneficially to other persons, and that, consequently, legacy duty and not succession duty is payable. There will accordingly be a direction to raise and pay legacy duty out of the fund which is in court or in the hands of the trustees. The commissioners, according to the ordinary rule, do not take any costs, and the costs of the petitioners and the respondents other than the commissioners will come out of the fund.

Solicitors: *Rowcliffes, Rawle & Co.; Park Nelson & Co.; Solicitor of Inland Revenue.*

W. W. K.

In re MASKELL AND GOLDFINCH'S CONTRACT.

STIRLING J.

1895

June 20.

Vendor and Purchaser—Gavelkind Land—Infant Customary Heir—Enfeoffment—Insufficient Consideration—Title.

A vendor furnished to the purchaser as part of his title to gavelkind lands certain customary feoffments with livery of seisin made to him when he purchased the property by infant co-heirs in gavelkind at the age of fifteen. It appeared on the face of the title that the purchase-money paid by him to the infants was not the full value of their shares, and that they were still under twenty-one:—

Held, that the title could not be forced upon the purchaser.

SUMMONS under the Vendor and Purchaser Act, 1874.

Richard Henry Carr died intestate on August 28, 1892, seised in fee simple in possession of lands in the county of Kent of gavelkind tenure, and leaving him surviving his widow, Ruth Carr, and three sons, Edwin, Albert, and Arnold Carr, his co-heirs according to the custom of gavelkind, subject to the right of their mother to dower. Of these sons Edwin was adult, and Albert and Arnold were infants.

On November 20, 1893, Ruth Carr and Edwin Carr conveyed the whole property to George Maskell in fee simple. The deed of conveyance recited an agreement by the widow and all the three sons for the sale of the property to George Maskell at the price of 750*l.*; that Albert and Arnold Carr were not of full age, and that it had therefore been agreed that they should convey their shares by customary feoffments; and that the amount of the purchase-money apportioned in respect of the estate of Ruth Carr was 375*l.*, and in respect of the estate of Edwin Carr was 125*l.* In the operative part of the deed Ruth Carr, in consideration of 375*l.* paid to her, conveyed "as beneficial owner in respect of her undivided share to which she is entitled for the whole of her dower in the said hereditaments"; and Edwin Carr, in consideration of 125*l.* paid to him, conveyed "as beneficial owner in respect of his one equal undivided third part (subject to the said dower)."

On December 5, 1893, Albert Carr and Arnold Carr, having both attained the age of fifteen, in consideration of 125*l.* paid to

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each of them, and in exercise of a custom of gavelkind tenure, by charter of enfeoffment and livery of seisin, conveyed each his equal undivided third share in the property to George Maskell in fee.

On October 24, 1894, George Maskell entered into a contract for the sale of the property to Edward Foster Goldfinch. After investigation of the title, the purchaser made (inter alia) the following requisition: "Upon what basis was the purchase-money apportioned by the conveyance of November 20, 1893, and the feoffments of December 5, 1893? Mrs. Ruth Carr's dower would only consist of a moiety for life whilst chaste and unmarried. Upon what principle does she receive a moiety of the purchase-money?" To this the vendor replied as follows: "It was so divided at the express desire of the sons, who wished to deal liberally with their mother."

It appeared that Albert and Arnold Carr were still infants under twenty-one, and were living with their mother in Russia; and the purchaser refused to accept the title on the ground that the capitalized value of the widow's dower should have been calculated, and that amount only paid to her; that instead of this the widow had been paid more, and Albert and Arnold Carr less than they were respectively entitled to; and that, being still under twenty-one, they could not release their right.

The vendor then took out this summons, and asked (inter alia) for declarations that the fee simple in the shares late of Albert and Arnold Carr in the property was conveyed to and absolutely vested in him by the two indentures of feoffment of December 5, 1893, and the liveries of seisin in accordance therewith; and that a good title had been shewn to the property in accordance with the contract.

Gatey in support of the summons. It was for the benefit of the infants that the property should be sold as a whole; and there is no doubt that a better price was obtained by such a sale than would have been realized if the various shares had been sold separately. The infants were not bound by the contract; but they had the legal estate, and when they had attained the customary age of fifteen they became entitled to give their land

by way of sale as lawfully as they could if they were of full age. They then elected to come in under the contract and to convey their shares in the customary manner by feoffment with livery of seisin. According to some of the authorities it appears that the custom only extends to sales for a valuable consideration: Sandys' Consuetudines Kanciæ (ed. 1851), p. 169; but in Robinson on Gavelkind (ed. 1858), p. 133, it is suggested that an infant can convey otherwise than for value, though in a note by Wilson in the 3rd edition of that work (see p. 277) the correctness of this view is doubted. This, however, was a sale for valuable consideration; and I submit that upon such a sale a purchaser is not bound to see that the infant was paid the full purchase-money for his share, and that the Court will not inquire whether or not this was the case. There is an epitome of the state of the law as to feoffments by infants under the custom of gavelkind given in a note in Davidson's Precedents in Conveyancing, vol. ii. Part I. 4th ed. pp. 244, 245, 246.

[STIRLING J. The infants may still have a lien for the balance of the proper purchase-money for their shares.]

They can have no other rights than those they would have if of full age; and this is, at all events, a question of conveyance rather than of title.

W. J. Tanner, for the purchaser. According to the custom of Kent, although a widow has for her dower a moiety of her husband's lands of gavelkind tenure, she is only entitled to such moiety as long as she lives chaste: Robinson on Gavelkind, 3rd ed. pp. 205, 206, 217. Mrs. Carr was, therefore, entitled to nothing more than the capitalized value of her life interest in the moiety. The liberty allowed to infants of selling and conveying their lands of gavelkind tenure at the age of fifteen was for the convenience of commerce, and the limitations of such liberty were and are that the infant must receive valuable consideration and must not be wronged or imposed upon: Bacon's Abridgment, vol. iv. 7th ed. p. 49. An infant is, therefore, entitled to receive the full value of his share: Davidson's Precedents (ubi supra); he must "have recompence for it": Sandys (ed. 1851), p. 169; Elton on the Tenures of Kent, p. 84. It is clear that in this case the infants have been imposed upon,

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and being still under age they cannot release; so that the purchaser, if he took the property, would be liable to claims by them when they attained twenty-one. The title, therefore, is one which cannot be forced upon a purchaser.

Gatey, in reply.

STIRLING J. stated the facts of the case, and continued:—It appears to me that the purchaser's objection is valid. The question is one of a kind which does not often occur, and arises in relation to a sale of land of gavelkind tenure. Counsel have referred me to certain statements of the law on the subject contained in Davidson's Precedents in Conveyancing, vol. ii. Part I. 4th ed. p. 244, 245, 246, which they are content to accept (and I see no reason why they should not be accepted), so far as they are material, as a correct statement of the law. It is there laid down: "Every one of the age of fifteen years holding or claiming to hold any land in gavelkind may give (by way of sale) his land, of which he is seised, as lawfully and freely as any other person of the age of twenty-one years his foreign tenures which are held by knight's service: Itin. of Kent, 55 Hen. 3, cited Sandys' Consuetudines Kanciæ, p. 166. . . . The later resolutions and practice have added the following reasonable and proper restrictions to this customary alienation:—that it must be by *feoffment*, and the livery of seisin must be propriâ manu of the infant, and not by letter of attorney; nor does the custom extend to any other conveyance or assurance, for it shall be taken strictly. . . . It is said, that the custom extends only to sales for a valuable consideration: Sandys, p. 169 . . . it must be evidenced by a deed or writing signed by the infant's own hand, Id. 185; and at the time of the feoffment the infant must be in the actual possession of the land. . . . It would seem that an infant, as he cannot execute a release, cannot give a valid receipt for the purchase money; for the general practice is to add to the memorandum of livery of seisin, an attestation that the consideration money was paid to the infant, instead of indorsing a receipt for it: Robinson, 277, note (*b*); but, although a purchaser may without personal risk pay the money to the infant, it is often advisable for the infant's sake

that the purchaser should require it to be invested in the funds in the names of trustees, or even in the infant's name, until he attains twenty-one; and usually there is no difficulty in prevailing on the vendor to adopt this course."

To that must be added the statement in Bacon's Abridgement, vol. iv. 7th ed. p. 49, to which I have also been referred: "The liberty of selling was allowed at the age of fifteen for the convenience and necessity of commerce, which in these small divided shares was absolutely necessary; yet it was allowed under such limitations and restrictions, that the infant could not be wronged or imposed upon; therefore an infant that sells must have a valuable consideration, because otherwise it is a plain sign that he was defrauded."

It is contended that on the facts of this case there is evidence that the infants have been wronged and imposed upon; and I think that there is. The feoffments of December 5, 1893, must be looked at in the light thrown on them by the recitals in the deed of November 20, 1893. It is then seen that the contract on which those conveyances were based was for the sale of the whole of the property at one undivided price of 750*l*. The mother took one-half of that sum, and that, on the face of the transaction, was clearly far more than she was entitled to take. Further, as was pointed out, she was the guardian of the infants, and therefore stood in a fiduciary position as regards them. That makes her position no better, but rather worse. That being so, the infants, taking advantage of this contract, were entitled to a greater share of the purchase-money than they received. Each of them had a right to receive more than he did receive, and neither of them, as appears from the statement I have read, can release that right until he is twenty-one, and is in full possession of the facts. I think, therefore, that, on the facts before me, the vendor has not made out such a title as a purchaser can be called upon to accept. For it is perfectly possible that these infants, on attaining twenty-one, and returning to this country, may assert some claim in respect of the share of the purchase-money which was paid to their mother in excess of what she ought to have received. In my opinion, the requisition is well founded. I will accordingly make a declaration that the purchaser has not

STIRLING J. accepted the title, and that the requisition in question has not been sufficiently complied with; and I order the vendor to pay the costs down to and including the present hearing; but I will reserve liberty to him to apply in case he can hereafter make a good title. As the vendor does not object, I also give the purchaser liberty to apply in all respects as if he had taken out a summons himself.

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Solicitors: *J. E. & H. Scott, for Scott & Warhurst, Herne Bay; Moon, Gilks & Moon.*

W. W. K.

MELVILLE *v.* MIRROR OF LIFE COMPANY.

KEKEWICH J.

1895

June 26, 27.

[1894 M. 3336.]

Copyright—Photograph—"Author"—Photograph made for "good and valuable Consideration" and "for or on behalf of" a Person—Penalty—Persons liable—Fine Arts Copyright Act, 1862 (25 & 26 *Vict. c.* 68), *ss.* 1, 6.

The "author" of a photograph within the meaning of s. 1 of the Fine Arts Copyright Act, 1862, is the person who generally controls the operation of taking the photograph, and a person who performs the manual operations under his control and direction is not the author.

A photographic portrait taken on the terms that the photographer may sell copies, though without payment by the subject to the photographer, is made for a "good and valuable consideration" within the proviso in the above-mentioned section: but where it is the intention of the parties that the negative shall be kept by the photographer as his own property, the photograph is not made "for or on behalf of" the subject, and therefore the proviso does not apply.

The words "any other person" in s. 6 of the Fine Arts Copyright Act, 1862, mean any person other than the author, and consequently include the person photographed if he is not the author.

ACTION for infringement of copyright.

The plaintiff sued as the proprietor of two photographs of well-known athletes or sporting celebrities named respectively George Crossland and F. E. Bacon. The plaintiff was duly registered at Stationers' Hall as the proprietor of the photograph of Crossland on September 28, 1894.

The defendant company were the proprietors, and the defendant A. H. McWade was the printer and publisher of a weekly paper called *The Mirror of Life*.

The plaintiff alleged that the defendants on October 20, 1894, wrongfully repeated and copied the photograph of Crossland in *The Mirror of Life* of that date, and had published and distributed a very large number of copies of their paper of that date. There was also a similar allegation as to the photograph of Bacon, and the issue and publication of the same paper on October 6, 1894.

The plaintiff claimed an account of the number of copies of *The Mirror of Life* of the said dates published and sold by the defendants, delivery to the plaintiff of all copies of *The Mirror*

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of Life containing such wrongful copying and repetition then in the possession of the defendants, and a penalty of 10*l.* for each copy so published and sold.

At the hearing the plaintiff's case as to the photograph of Bacon was not proved.

As to the portrait of Crossland, there was a conflict between the evidence given by the plaintiff and his son, who assisted him in his business, on the one hand, and Crossland on the other hand, but the result of the evidence was as follows: The plaintiff was in the habit of taking and selling to the public the photographs of well-known athletes or sporting celebrities. At the request of the plaintiff, Crossland allowed the plaintiff to take a photograph of him. The plaintiff made no charge for taking the photograph, and supplied copies thereof to Crossland, some for his private use gratuitously, and other additional ones on payment being made. It did not appear that any definite arrangement was made as to the copyright; but his Lordship found as a fact that the plaintiff was to be at liberty to sell copies of the photograph. The agreement was not reduced to writing.

When the photograph was taken the plaintiff and his son were both present. The son posed Crossland and performed all the manual acts, while the father stood by and looked on, and at the proper moment held up his hand so as to indicate to Crossland the direction in which he was to look.

The defendants, being desirous of printing a portrait of Crossland in *The Mirror of Life*, applied to the plaintiff by letter for a copy of the photograph, with permission to print and publish the same. The plaintiff did not answer the letter; and the defendants applied to Crossland for a copy of the photograph, and ultimately obtained one through a friend of his. Of this photograph they caused a printed copy to be inserted in *The Mirror of Life* of October 20, 1894.

It appeared that upwards of 8000 copies of that issue of the paper were sold. (1)

(1) By the Fine Arts Copyright Act, 1862 (25 & 26 Vict. c. 68), s. 1, "The author . . . . of every original . . . . photograph . . . . which shall not have been sold or disposed of before the commencement of this Act, and

Le Riche, for the plaintiff. The defendants are liable to penalties in respect of each one of the copies sold (see *Ex parte Beal* (1)); but the plaintiff will be content with penalties for twenty-five copies. [He referred also to *London Stereoscopic and Photographic Co.* v. *Kelly*. (2)]

Eve, for the defendants. This is not an action for damages under s. 11 of the Fine Arts Copyright Act, 1862, but for penalties under s. 6; and, whatever right the plaintiff may have to an injunction on the principle of *Pollard* v. *Photographic Co.* (3), such an action will not lie unless the plaintiff is the registered proprietor of the copyright within the meaning of the Act: *Tuck & Sons* v. *Priester*. (4) It is contended that he is not.

First, the plaintiff was not the "author" of the photograph within s. 1. The son, and not the father, was the author. He posed the subject and arranged the picture, and he was the "effective cause" of the photograph: *Nottage* v. *Jackson*. (5) Clearly the plaintiff was not the sole author, though it is possible that he and the son might be held to be joint authors, as intimated in that case.

Secondly, assuming that the plaintiff was the "author" of the photograph, yet he is not entitled to the copyright because the proviso in s. 1 applies to this case; and there was no agreement in writing as required by that proviso. Whatever the true

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his assigns, shall have the sole and exclusive right of copying, engraving, reproducing, and multiplying such . . . . photograph, and the negative thereof, by any means and of any size, for the term of the natural life of such author, and seven years after his death; provided that when any painting or drawing, or the negative of any photograph, shall for the first time after the passing of this Act be sold or disposed of, or shall be made or executed for or on behalf of any other person for a good or a valuable consideration, the person so selling or disposing of or making or executing the same shall not retain the copyright thereof, unless it be expressly reserved to him by agreement in writing."

By s. 6, "If the author of any . . . . photograph in which there shall be subsisting copyright, after having sold or disposed of such copyright, or if any other person, not being the proprietor for the time being of copyright in any . . . . photograph, shall, without the consent of such proprietor, repeat, copy, colourably imitate, or otherwise multiply for sale, hire, exhibition, or distribution, . . . any such work," &c., such person shall for every such offence forfeit to the proprietor a sum not exceeding 10*l*.

(1) L. R. 3 Q. B. 387, 395.
(2) 5 Times L. R. 169.
(3) 40 Ch. D. 345.
(4) 19 Q. B. D. 48, 629.
(5) 11 Q. B. D. 627, 632, 637.

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view of the evidence may be, it is at all events clear that Crossland allowed the plaintiff to take this photograph, and it is part of the plaintiff's own case that he took it with a view to his own advantage. There was, therefore, good or valuable consideration within the meaning of the proviso. It is also clear that the photograph was made or executed for or on behalf of Crossland, to whom copies were supplied, both gratuitously and for payment.

Thirdly, there is no case for the infliction of penalties on the defendants. If any one is liable to a penalty it is Crossland and not the defendants. The words "any other person" in s. 6 are wide enough to include the person photographed if he is not the author of the photograph. It was Crossland who sent the photograph to the defendants for the express purpose of its being multiplied in *The Mirror of Life*. If he had had it copied by another photographer surely he, and not the photographer, would have been the person liable to the penalty.

Le Riche, in reply. On the evidence it is clear that the plaintiff was the "author" of the photograph. His son merely acted as his agent and under his directions. *Nottage* v. *Jackson* (1) has therefore no application.

The photograph was not taken "for or on behalf of" Crossland. Paying for copies is an entirely different thing from paying for the taking of the photograph. Moreover, Crossland did not pay for the copies supplied for his private use. The plaintiff took the photograph for himself, because he found it to his advantage in his business to sell photographs of sporting celebrities. There is no suggestion that it was intended that the negative should belong to Crossland.

Crossland is not the person liable to penalties. The multiplication of the photograph was not his act, but the act of the defendants. If he had had the photograph copied by a photographer the case would have been entirely different: the photographer would have been his agent, and the multiplication would have been his act.

KEKEWICH J., after stating that in the case of Bacon there had been no infringement of the plaintiff's right, continued as

(1) 11 Q. B. D. 627.

follows:—In the case of Crossland I have, in *The Mirror of Life* of October 20, 1894, a reproduction of the registered photograph of the plaintiff. Of that there can be no doubt. The two portraits are substantially the same, and intended to be the same. It is taken from a copy supplied to *The Mirror of Life* by Crossland himself through his friend. The person who sues for the penalties in respect of the multiplication of copies is Mr. Melville, senior, the photographer, carrying on business, not apparently in partnership with, but together with, his son. The father being the principal photographer, the question is whether he is to be held to be the "author" of this photograph. The evidence is somewhat conflicting; but my conclusion is that the son assisted the father—that whatever the son did was merely as assistant of the father; he was throughout the agent, and not the principal; the father was the principal throughout. Whether the son arranged the furniture, posed the subject, went to the dark room for the plate and put it into the camera, or eventually took off the cap, seem to me to be matters of detail. What I have to inquire into is the real relation of the father to the son in the matter. I have no doubt that the son, though according to his own view perfectly competent to do it all himself, did, as regards this particular portrait, act under the direction and as agent of his father. It seems to me that that makes the father the "author" of the photograph directly within such definition as is to be found in *Nottage* v. *Jackson* (1), and takes the father outside the criticism of the Master of the Rolls and the Lords Justices in that case, which would go to shew that an agent is not an author within s. 1 of the Fine Arts Copyright Act, 1862, and that the principal cannot be the author unless he is the active principal. In that case, no doubt, the principal was the gentleman who sent some one to Kennington Oval to take the photographs of the Australian cricketers playing there, and the Court did not see its way to saying that a gentleman sitting in his room in Regent Street could be the author of a photograph which was being taken at Kennington Oval. I have referred also to the case of *Kenrick & Co.* v. *Lawrence & Co.* (2), in which *Nottage* v. *Jackson* (1) was cited and considered. I think

(1) 11 Q. B. D. 627. (2) 25 Q. B. D. 99.

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the right conclusion is that the plaintiff, Mr. Melville senior, was the "author" of the photograph. That being so, he is clearly entitled to the copyright unless the proviso in s. 1 of the Fine Arts Copyright Act, 1862, is applicable. [His Lordship read the proviso.] Mr. Eve has contended that the proviso is applicable because a valuable consideration passed between Crossland and Melville. The wording of the section is far from clear, but upon the whole I am of opinion that Mr. Eve's contention is right upon that point. The evidence as to what took place is somewhat conflicting. [His Lordship referred to the evidence in detail.] My conclusion, after weighing the evidence carefully, is that the real agreement between Crossland and Melville was that Melville should be at liberty to sell, though he made no charge for taking the photograph. It is part of Melville's business to sell the photographs of sporting celebrities, and merely to be allowed to take this photograph of Crossland with the right of selling it was an advantage to him. I think, therefore, that there was "good or valuable consideration" within the meaning of the proviso. But then, in order that the proviso should apply, it is necessary that the negative should have been made or executed by the photographer "for or on behalf of" some other person. I cannot see how the negative of this photograph can be said to have been executed "for or on behalf of" Crossland. It was a photograph of Crossland; but it is not pretended that he was to have the negative or any right of property in it. It seems to me that a man cannot be said to make a photograph for or on behalf of another, when that other is not entitled to have the negative of the photograph when made. My conclusion, therefore, is, that though the photograph was of Crossland, yet as the negative was not made or executed for or on behalf of him, the proviso has no application to the present case.

Then comes the question as to the effect of s. 6. [His Lordship read the section.] I see no reason why I should not give to the words "any other person" their full grammatical meaning, and hold that they include every person other than the author of the photograph, and consequently include the person photographed, if he is not the author of the photograph. I think that the person photographed, as well as all the rest of the world,

is excluded from multiplying copies of a photograph of himself of which he is not the author. It may be, therefore, that in this case Crossland himself is liable to penalties. But that does not, in my opinion, excuse the defendants, the Mirror of Life Company. They, however, appear to have acted in a straightforward manner. They applied by letter to Melville for this photograph, and, receiving no answer, they applied to Crossland himself, and got it through his friend. They cannot plead ignorance as an excuse; but they have not acted in such a way as, in my judgment, to expose themselves to any serious penalty. Upon the whole, I think that if I award a penalty of 5*l.* to the plaintiff the justice of the case will be satisfied. [His Lordship accordingly gave judgment for the plaintiff for 5*l.* and the costs of the action, with a set-off of the costs which the plaintiff was ordered to pay in respect of his unsuccessful claim as to the portrait of Bacon.]

Solicitors: *Victor Thomasset, for Joseph Sims, Manchester; T. Trimnell.*

C. C. M. D.

In re GOODENOUGH. MARLAND *v.* WILLIAMS.

[1895 G. 315.]

Interest—Rate of—Reversion—Capital and Income—Apportionment as between Tenant for Life and Remainderman.

In future, in applying the rule in *In re Earl of Chesterfield's Trusts* (24 Ch. D. 643) as to the apportionment as between capital and income of the amount of an unconverted reversionary interest which has fallen in, interest at 3, instead of at 4, per cent. ought to be adopted as the basis of calculation.

So *held* in a case where the reversion in question formed part of the estate of a testator who died in 1854.

ADJOURNED SUMMONS.

The Venerable William Goodenough, archdeacon of Carlisle, who died on December 13, 1854, by his will dated May 1, 1847, gave all his residuary real and personal estate to trustees upon trust to sell, convert, and invest, and to stand possessed thereof and of the investments thereof upon trust for his daughter,

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Emily Isabella Hawkins, the wife of Dr. F. B. Hawkins, for her life, and from and after her decease, if she should die in the lifetime of her husband, then for such persons as she should by will appoint.

The residuary estate of the testator comprised an absolute reversion, expectant upon the decease of the survivor of his said daughter and her husband, in certain funds, now represented by 10,000*l.* New Consols.

The testator's daughter, by her will dated March 26, 1867, appointed the trust funds comprised in her father's will, giving a life interest therein to her husband, and appointing the corpus to other persons. She died on September 5, 1878.

The reversionary interest was retained by the trustees of the archdeacon's will unconverted until the death of Dr. F. B. Hawkins, which took place on December 7, 1894.

This summons was taken out by the trustees of the will of the archdeacon against E. W. Williams, who was the legal personal representative both of Emily Isabella Hawkins and of her husband Dr. F. B. Hawkins, and other persons beneficially interested under the will of Emily Isabella Hawkins, asking for the determination (inter alia) of the question whether the defendant E. W. Williams, as such legal personal representative, was entitled to any part of the capital of the 10,000*l.* New Consols.

H. Robertson, and *Crawley,* for the plaintiffs.

Badcock, for the defendant E. W. Williams.

Marten, Q.C., and *Lemon*; *Bramwell Davis, Q.C.,* and *Leonard Potts*; and *Renshaw, Q.C.,* and *T. T. Methold,* for other parties.

KEKEWICH J., after stating that the rule in *In re Earl of Chesterfield's Trusts* (1) was applicable, continued as follows:—I now come to what to my mind is a point of great importance. The rule in *In re Earl of Chesterfield's Trusts* (1) is to ascertain the amount which at the death of the testator, put out at compound interest at 4 per cent., will yield the sum which is to be received, and the amount so ascertained is treated as capital, and the rest as income; and that rule, as was pointed out by Kay J. in *In re Hobson* (2), certainly does in most cases, and

(1) 24 Ch. D. 643. (2) 55 L. J. (Ch.) 422, 425.

would here, work very greatly to the benefit of the tenant for life. That, however, is a matter with which I am not concerned. But it is obvious that an alteration in the rate of interest would make an enormous difference. It has hitherto always been 4 per cent., and only a few days ago I myself applied the rule at that rate. In that case I did not feel myself at liberty to make any alteration, because the point was not raised in argument. The question is no doubt part of the general question what rate of interest ought to be allowed. On that general question I have expressed my own view several times. It has seemed to me to be a matter which ought to receive the consideration of all the judges in the Chancery Division, and to be settled by a joint opinion, but I am not aware of any procedure by which that can be done. The judges may and do meet for some purpose, but it is not competent to them to determine questions of law otherwise than between parties, and after hearing argument. Although formerly I have said more than once that I would not make a start, yet now, subject to what Mr. Badcock has to say, it seems to me that the time has arrived when some one must make a start. It is generally said that money doubles itself at 5 per cent. compound interest in fourteen years. I have not verified that proposition; but it is evident that with interest at 4 per cent., a longer, and at 3 per cent., a much longer, period will be required. The sum which will produce 10,000*l.* at 4 per cent. compound interest is much smaller than the sum which will produce that amount at a 3 per cent. rate, and the adoption of 3 per cent. instead of 4 will largely benefit capital as against income. What I have to face is the fact that 4 per cent. has for generations been regarded as the proper rate of interest to be charged or allowed in the Chancery Division unless 5 per cent. is taken for special reasons. Again, 5 per cent. has generally been allowed by juries when giving interest by way of damages. They have always been told that they may allow it, and I believe they have allowed it without further question. But we all know that at the present day not only are trustees unable to obtain 4 per cent. upon an investment of trust securities, but ordinary investors, who are able and willing to go outside trust securities, but yet are determined

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not to be speculative, find it impossible to get more than 3 per cent., and are glad to get that with safety. I have looked at an authoritative statement as to the value of Bank of England Stock, a security of the highest rank, and I find that it only produces 2*l.* 9*s.* 5*d.* per cent. per annum. And Consols at $2\frac{3}{4}$ per cent. reducible to $2\frac{1}{2}$ per cent. are up to something like $107\frac{1}{2}$. It does seem to me that it would be bordering on an absurdity for judges of the Chancery Division to say that interest is to be calculated at 4 per cent. when not only trustees, but ordinary prudent investors determined not to speculate, cannot obtain 3 per cent. I will, therefore, face the difficulty, and, unless Mr. Badcock can convince me to the contrary, I propose, notwithstanding the anomaly that I acted very differently a few days ago, to ascertain the fund attributable to capital in this case on the basis of interest at 3 per cent., instead of 4 as in *In re Earl of Chesterfield's Trusts.* (1)

Badcock. The reversion in this case devolved on the trustees so long ago as 1854. It might and ought to have been then converted; and at that time, and for many years after, 4 per cent. interest was readily obtainable. Surely if so startling a change is to be made as that proposed by your Lordship, this is a most unfortunate case in which to make it. At what point of time is the calculation on the basis of 3 per cent. to begin? It would be unfair to adopt that rate throughout when during the greater part of the time 4 per cent. could have easily been obtained. Surely it would be sufficient and right to confine the 3 per cent. to the last few years. In valuing reversions, insurance offices charge 5, if not 6, per cent. interest, and there can be no hardship, therefore, in adopting 4 per cent. [He referred to *Re Flower* (2); *In re Hobson* (3); *London, Chatham and Dover Ry. Co.* v. *South Eastern Ry. Co.* (4)]

KEKEWICH J. I have considered the propriety of adopting a new rule in a case such as the present, having regard to the time during which the reversion has been outstanding, and the

(1) 24 Ch. D. 643.
(2) 62 L. T. (N.S.) 216; 63 L. T. (N.S.) 201.
(3) 55 L. J. (Ch.) 422.
(4) 40 Ch. D. 100; [1892] 1 Ch. 120; [1893] A. C. 429.

possibility during a long portion of that time of obtaining more than 3 per cent., perhaps 4 per cent., on good security. The answer to the objection raised on that head is that this is not a question of investment, but of the application of an arbitrary rule adopted by the Court with reference to the rate of interest, and it is impossible to vary the rate according to circumstances; it is necessary to take some one rate which is fair to tenant for life and remainderman, having regard to the commercial rate of interest current among investors. If I acted on any such principle as Mr. Badcock suggests, I should have to take 4 per cent. for part of the time, and 3 per cent. for the last few years. That is not in accordance with the rule, which is arbitrary, and fixes the rate of interest in the manner I have mentioned. The rate may in one case bear hardly on the tenant for life, and in another on the remainderman. Rules of this kind cannot be made to fit all cases with equal fairness.

I have thought it my duty to have the courage of my opinions, and to say that the time has now come when judges can no longer adopt the rate of 4 per cent. If my decision could be reviewed, I should be extremely glad, because I think that the matter is one of great importance to those who have to do with money in the Chancery Division, and a very great part of the business in the Chancery Division is concerned with the investment of money in which the rate of interest is a subject of constant consideration. Of course, if any other judge does not think I am right, I shall be ready to reconsider the question, because I think that uniformity of practice is much more important in matters of this kind than the justice of any particular case; but until I am corrected I shall act on the view which I have expressed; and in the present case I shall make an order in conformity with that in *In re Earl of Chesterfield's Trusts* (1), but with the substitution of the rate of 3 per cent. for the 4 per cent. rate directed in that case.

Solicitors: *Forster, Frere & Co.; Hepburn, Son & Cutcliffe; R. S. Taylor, Son & Humbert; Hunters & Haynes.*

(1) 24 Ch. D. 643.

C. C. M. D.

KEKEWICH J.
1895
July 18, 26.

In re DUKE OF CLEVELAND'S ESTATE. HAY *v.* WOLMER.

[1895 C. 812.]

Tenant for Life and Remainderman—Apportionment—Capital and Income—Money paid under erroneous Order of Court—Rate of Interest.

Where money forming part of the residuary estate of a testator was paid away under an erroneous order of the Court, and subsequently, on the order being varied on appeal, was recovered, but without interest :—

Held, that the money so recovered ought not to be treated as consisting of capital only, but that a fair proportion of it ought to be paid to the tenant for life of the residue as income, according to the principle of *Turner* v. *Newport* (2 Ph. 14) :

Held, however, that in applying that principle interest ought to be calculated at the rate of 3 per cent., instead of 4, as being more agreeable to the facts of present experience.

ADJOURNED SUMMONS.

Pursuant to an order made by Kekewich J. in August, 1892, in the action of *In re Duke of Cleveland's Estate, Viscount Wolmer* v. *Forester* (1), considerable sums of money, forming part of the residuary estate of the Duke of Cleveland (who died in August, 1891), were paid to Captain Forester and Lord Barnard as tenants for life of the Somerset estates and Raby Castle estates devised by the will of the Duke.

The order of Kekewich J. was subsequently varied on appeal by the Court of Appeal (2), and thereupon the moneys so paid became in part repayable, but without interest, which, it was conceded, was irrecoverable.

The amount repayable in respect of the Somerset estates was ascertained by agreement to be 7263*l.*, and was repaid in June, 1894. The amount repayable in respect of the Raby Castle estates was fixed by compromise (which was sanctioned by the Court) at 31,000*l.*, and was repaid in February, 1895.

This summons was taken out by the tenants for life of the residuary estate as plaintiffs against the trustees and executors of the will and the persons beneficially interested in remainder

(1) [1894] 1 Ch. 164, 168. (2) See [1894] 1 Ch. 176.

in the corpus of the residuary estate as defendants for the purpose of having it determined whether the plaintiffs were entitled to have any and what apportionment as between capital and income made in respect of the sums so recovered.

Renshaw, Q.C., and *C. Ashworth James*, for the plaintiffs. A fair proportion of the money recovered ought to be treated as income and paid to the tenants for life, according to the principle applied in cases where money has been properly invested on mortgage, which on ultimate realization proves insufficient to pay the principal and interest: see *In re Foster* (1); *In re Moore* (2); *Ackroyd* v. *Ackroyd.* (3) The principle of *In re Earl of Chesterfield's Trusts* (4) is not applicable.

E. Beaumont, for the trustees and executors.

Benjamin Eyre, for the defendants interested in the corpus. I submit that this fund is corpus and corpus only. It is no doubt unfortunate for the tenants for life that the rules of the Court do not allow the recovery of interest on money paid away under a mistake. When the case was before the Court of Appeal it was considered whether these tenants for life could recover interest, and it was held that they could not. The fund, therefore, consists of corpus only; it is the identical fund which was corpus of residue at the time of the testator's death. The cases cited are not applicable, as they had reference to funds consisting of principal and interest, and not to funds consisting of corpus only, paid away as corpus by mistake, and subsequently recovered as corpus. *Ackroyd* v. *Ackroyd* (3) was the case of an absconding executor, and there was no question there as between tenant for life and remainderman, but only as to the bringing of money into hotchpot.

July 26. KEKEWICH J. The only reason why I took time to consider this case was that Mr. Eyre insisted with some truth, as well as force, that the money now to be disposed of consisted of principal only, and not at all of interest, and that therefore no part thereof ought to be paid to the tenant for life. That the

(1) 45 Ch. D. 629.
(2) 54 L. J. (Ch.) 432; 33 W. R. 447.
(3) L. R. 18 Eq. 313.
(4) 24 Ch. D. 643.

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money recovered in respect of the Somerset estates consists of principal only is absolutely true, the amount due having been exactly ascertained, and it having been conceded that interest was irrecoverable; and it is true also, I think, of the money recovered in respect of the Raby Castle estates, notwithstanding that there it was arrived at, not by arithmetical calculation, but by compromise. Nevertheless, I think that the tenant for life is entitled to a fair proportion. There is no occasion now to consider how it came to pass that these sums were recoverable, and were recovered on behalf of the residuary estate. Suffice it to say that they were sums originally belonging to the residuary estate, and as a matter of fact not recovered until some time after that residuary estate became divisible—that is, after the expiration of twelve months from the testator's death. On general and broad principles sums so recovered must be divided between the tenant for life and the remainderman on a fair basis. Those principles are expounded by Lord Cottenham in *Turner* v. *Newport* (1), and are the foundation of the cases cited in argument, to which I need not further refer. Except that I shall substitute 3 for 4 per cent. as being more agreeable to the facts of present experience, I shall follow *Turner* v. *Newport* (1), and the amount receivable by the tenant for life will be calculated accordingly.

Solicitors: *Williams & James; Jennings & Finch; Horn & Francis.*

(1) 2 Ph. 14.

C. C. M. D.

In re STANDARD GOLD MINING COMPANY.

[68 of 1891.]

VAUGHAN WILLIAMS J.

1895

May 15; *July* 17.

Company—Winding-up—Private Examination — Depositions — Inspection—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 115—*Companies Winding-up Rules, April*, 1892, *rr.* 11, 32.

In the winding-up of a company—at any rate under a compulsory order—every contributory, and every creditor whose claim or proof has been admitted, is entitled, as of right, to inspect and take copies of all depositions of evidence taken at a private examination under s. 115 of the Companies Act, 1862, whether the evidence was given by himself or by other persons.

In the winding-up, by order of the Court, of the Standard Gold Mining Company, Limited, leave was obtained by a creditor to take proceedings under s. 10 of the Companies (Winding-up) Act, 1890, against G. B. Mee and others in respect of alleged misfeasances; but the creditor instituted proceedings against Mee only.

Mee and several other persons had been privately examined under s. 115 of the Companies Act, 1862. The depositions were not placed on the ordinary file which is open to inspection by contributories, and creditors who have proved their debts, but in accordance with the practice of the registrar's office were placed on a separate file.

Mee, who was a contributory of the company, wished to inspect and take copies of all the depositions, but was refused access to the file on which the depositions were, and he applied to Vaughan Williams J. in chambers for liberty to inspect the file, and in particular the depositions, and to take copies of or extracts from the same, or any part thereof, or, in the alternative, for a declaration that the depositions were then upon and formed part of the file of proceedings of the company under rules 11 and 32 of the Companies Winding-up Rules, April, 1892.

The judge made an order refusing the application; and Mee thereupon moved to discharge the order, and that he might have the liberty, or, in the alternative, the declaration, for which he had asked in chambers.

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Bramwell Davis, Q.C., and *Theobald*, for the applicant. The applicant has an absolute right to inspect and take copies of all the depositions.

By rule 58 of the General Order of November, 1862, all depositions and other documents relating to a winding-up were to be filed as far as might be in one continuous file, and every contributory and every creditor whose debt or claim had been allowed was to be entitled to inspect the file and take copies of any documents comprised therein. Under this rule it was held that the depositions taken under s. 115 of the Companies Act, 1862, need not be placed on the file: *In re London and Lancashire Paper Mills Co.* (1)

By rule 180 of the Companies Winding-up Rules, 1890, it was provided that the General Order of November, 1862, should not apply to liquidations under the Act of 1890; and by rule 11 of April, 1892, all depositions and other proceedings in a winding-up in the High Court, by order of the Court, are to "be kept and remain of record in the office of the registrar in one continuous file."

It was the duty of the officials in the registrar's office to file these depositions on the ordinary file of proceedings in the winding-up of this company; and the fact that the depositions have been placed on a separate file cannot deprive the applicant of his right to inspection under rule 32 of April, 1892, which provides that "every contributory and every creditor whose claim or proof has been admitted shall be entitled . . . to inspect the file of proceedings, . . . and to take copies or extracts from any documents therein."

In bankruptcy, depositions taken at a private examination must be placed on the file: *In re Beall.* (2) In that case Lord Davey says: "They are placed there for the inspection of the debtor and of any other person who is entitled to inspect them."

If there is no absolute right of inspection, the Court in its discretion may allow the applicant to inspect the depositions, just as it may allow a creditor to attend the examination: *In re Greys Brewery Co.* (3)

(1) 57 L. J. (Ch.) 766. (2) [1894] 2 Q. B. 135.
(3) 25 Ch. D. 400, 408.

Gore-Browne, for the liquidator. But for the case last cited, and the new rules made in April, 1892, it could not be argued that the old rule as to secrecy did not still apply, both in bankruptcy and in winding-up.

Under the Bankruptcy Act, 1869, and the Bankruptcy Rules, 1870, the Court had a discretion to allow or refuse inspection: *Ex parte Pratt* (1); Vaughan Williams on Bankruptcy, 4th ed. p. 80. The new rules are in substance the same as the rules of 1862, under which the Court of Chancery had a discretion as to whether inspection should be allowed, and was not disposed to allow it except under special circumstances: *In re Norwich Equitable Fire Insurance Co.* (2); *In re Heseltine & Son* (3); *In re American Exchange in Europe* (4); *In re Gold Co.* (5) [He also referred to *North Australian Territory Co.* v. *Goldsborough, Mort & Co.* (6)

[VAUGHAN WILLIAMS J. referred to the Annual Practice, 1895, p. 1195.]

Bramwell Davis, Q.C., in reply.

July 17. VAUGHAN WILLIAMS J. Two questions have been raised. One is a question of right and the other a question of discretion.

It is said, first, that the applicant has a right to inspect the depositions; and, secondly, that if he has no absolute right to inspect, the Court ought, in the exercise of its admitted power, to give him leave to do so.

Depositions under s. 115 of the Companies Act, 1862, were taken in accordance with a practice which arose in the last century in bankruptcy. In bankruptcy the object of the examination was to give information to the Court, and the examination was not, in any ordinary sense of the word, a proceeding. Nor were the depositions evidence against any one. Of course, where a deponent had made statements on affidavit in subsequent judicial proceedings, he might in cross-examination be asked whether he had said so-and-so on a previous occasion; and at all events, after

(1) 21 Ch. D. 439.
(2) 27 Ch. D. 515.
(3) W. N. (1891) p. 25.
(4) 58 L. J. (Ch.) 706.
(5) 12 Ch. D. 77.
(6) [1893] 2 Ch. 381.

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the Common Law Procedure Act, 1852, and I daresay before that, if any one wished to examine the deponent with reference to his depositions it was necessary to put them in his hands and confront him with them. But in no sense was a deposition evidence in any judicial proceeding.

The power given to the Court in Bankruptcy—it is now under s. 27 of the Bankruptcy Act, 1883—is to a large extent the basis of s. 115 of the Companies Act, 1862. I think that for a very long time the effect of that section has been treated as identical with the effect of the Bankruptcy Acts, though perhaps this view has not been taken in the more recent cases.

The right to inspect depositions taken under s. 115 has been more or less dealt with by rule 58 of the General Order of the Court of Chancery of November, 1862. Notwithstanding the very wide terms of that order, it seems to me, so far as I have been able to understand the authorities, that judges have treated examinations under s. 115 as private, and as if neither creditors nor contributories were as of right entitled to inspect the depositions. In bankruptcy the matter was governed by rule 9 of the Bankruptcy Rules, 1870; and there also the practice for a long time was to treat the depositions as private —as referring to matters intended for the information of the Court only.

I have to decide whether the practice is now right or wrong, and whether in a winding-up a creditor or contributory is not entitled under the rules now governing these matters to inspection of everything which is placed on the file, including depositions taken under s. 115 of the Act of 1862.

Difficulties must have arisen a very long time ago, and in liquidation probably soon after the Order of November, 1862, was made. Various devices were resorted to by trustees in bankruptcy and liquidators in order to keep the depositions off the file—e.g., by not taking the signatures to the depositions immediately. This, it seems to me, shews that practitioners were not quite certain that creditors and contributories were not entitled to inspection.

The rules at present in force in a winding-up are rules 11 and 32 of the Companies Winding-up Rules, April, 1892. The

words are very strong indeed, and seem primâ facie to give a right to inspection to the exclusion of any discretion in the matter. In the present case the depositions are not on the ordinary file kept under rule 11, but in pursuance of the practice in chambers have been placed on a separate file; but I do not propose to decide the case on any such ground as that they are not on the file. If the depositions ought to be on the ordinary file, I shall treat them as if they were there; if they ought not to be there, rule 32 does not apply to them.

Ex parte Pratt (1) was a decision on rules 9 and 12 of the Bankruptcy Rules, 1870, which, though not identical with the rules in winding-up, seem to me to be quite as strong. In *Ex parte Pratt* (1) [to the report of which in the LAW REPORTS his Lordship referred at considerable length] the Court seems to have thought that the respondent, who is stated to have proved as a creditor, had not an absolute right to a copy of his depositions, but that it was a mere matter of discretion whether he should be allowed to have a copy.

The right to inspect and take copies of depositions in bankruptcy was also discussed in *In re Beall* (2), in which it was held that depositions taken at a private examination under s. 27 of the Bankruptcy Act, 1883, were "a proceeding of the Court" within rule 12 of the Bankruptcy Rules, 1886, and ought to be placed on the file; and an application by a bankrupt to have depositions so taken removed from the file was refused, the ground of the application being that if left they might be brought to the knowledge of the Incorporated Law Society. Davey L.J., in delivering judgment, says (3): "The depositions were taken by the Court at the instance of the official receiver, and were taken down by a shorthand writer, who was sworn and who thereby became the agent of the Court. They were in fact taken by the Court itself for the purpose of the proceedings in the bankruptcy. Why they should not be placed on the file, like any other proceedings in bankruptcy, I am at a loss to understand, and, they being on the file, I can see no ground whatever for taking them off. They are placed there for the inspection

(1) 21 Ch. D. 439. (2) [1894] 2 Q. B. 135.
(3) [1894] 2 Q. B. 141.

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of the debtor and of any other person who is entitled to inspect them under rule 12." There it is expressly put as a matter of right and not as a matter of discretion. I find some difficulty in reconciling what was said by Davey L.J. with what was said by Jessel M.R. in *Ex parte Pratt* (1)—one says it is a matter of right, and the other that it is a matter of discretion.

There are some authorities in respect of examinations in the winding-up of companies, the last one being *North Australian Territory Co.* v. *Goldsborough, Mort & Co.* (2) [His Lordship read the head-note of the report in the LAW REPORTS, and continued:—] I do not understand from the statement of facts in that case that the defendants, who were applying for leave to inspect the depositions, were creditors or contributories in the winding-up; and it seems to me, therefore, that the case has no application to the one before me. I wish to observe, however, that the rule applied by Lord Esher M.R. seems to be the same as that which used to be applied in bankruptcy, where inspection was invariably refused, even on the application of a creditor, until notice had been given of an intention to use the depositions in some judicial proceeding.

When I find the practice inconsistent with a rule which has recently been re-promulgated, as in this case, and that there is a conflict of authority, it seems to me that I have no choice but to decide the case in accordance with the words of the rule. It would be very difficult to say that the applicant was not entitled to see these depositions. I treat them as being on the file, and the applicant as a person who, as a creditor or contributory, comes within the words of rule 32; and, however inconvenient it may be, I must give effect to the words of the rule.

But it is extremely inconvenient that the practice should be in this state. The Court ought to have a discretion in the matter; and if I were at liberty to exercise the discretion, I should allow the applicant to see his own depositions, but not those of the other deponents.

Solicitors: *Linklater, Hackwood, Addison & Brown; Loughborough, Gedge & Nisbet.*

(1) 21 Ch. D. 439. (2) [1893] 2 Ch. 381.

F. E.

GOVERNMENT STOCK INVESTMENT AND OTHER SECURITIES COMPANY *v.* MANILA RAILWAY COMPANY.

C. A.
1895
NORTH J.
June 27.
C. A.
June 28.

[1895 G. 365.]

Floating Security—Debentures—Mortgage of Assets of a Company.

The M. company issued a set of debentures by each of which the company undertook to pay the principal at a distant day, and to pay interest on given days half-yearly in the meantime, and the company charged "by way of floating security" all its property, present and future, with the payment. A condition indorsed on the debentures provided that "Notwithstanding the said charge the company shall be at liberty in the course and for the purpose of its business to use, employ, sell, lease, exchange, or otherwise deal with any part of its property until default shall be made in payment of any interest hereby secured for the period of three calendar months after the same shall have become due," or until order or resolution for winding-up. After an instalment of interest had fallen more than three months into arrear, but before the debenture-holders had taken any step to enforce their security, the company issued a set of bonds and mortgaged a specified part of its assets to secure the payment of them:—

Held, by the Court of Appeal (reversing the decision of North J.), that as to the property comprised in their security, the bond-holders had priority over the debenture-holders, for that after the expiration of the three months the security of the debenture-holders remained a floating security until they took some steps to enforce it and stop the company from carrying on its business, and the security while floating did not prevent the company from mortgaging its assets.

THIS was an appeal by the Manila Railway Company from an order of North J., restraining them from paying interest on their B bonds.

The Manila Railway Company, Limited, issued in 1889 debentures for 100*l.* each, by each of which the company undertook to pay to the bearer on January 1, 1978, or on such earlier day as the principal moneys thereby secured should become payable in accordance with the conditions indorsed, the sum of 100*l.*, and in the meantime to pay interest at 6*l.* per cent. by half-yearly payments on January 1 and July 1 in each year. "And the company hereby charges by way of floating security all its property whatsoever and wheresoever, both present and future,

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including its uncalled capital for the time being. This debenture is issued subject to the conditions indorsed hereon, and all persons may act accordingly." The first condition stated that the debenture was one of a series for securing the aggregate sum of 730,000*l.* ranking pari passu. Condition 2 was as follows:—

"Notwithstanding the said charge the company shall be at liberty in the course and for the purpose of its business to use, employ, sell, lease, exchange or otherwise deal with any part of its property until default shall be made in payment of any interest hereby secured for the period of three calendar months after the same shall have become due, or until an order of some court of competent jurisdiction shall have been made, or a special or extraordinary resolution shall have been duly passed for the winding-up of the company."

The conditions provided for the redemption of the debentures by annual drawings, which caused the reference in the body of the debentures to a day earlier than January 1, 1978.

By an indenture dated March 1, 1892, between the Manila Railway Company of the one part, and the Merchants Trust, Limited, of the other part, reciting the above issue of debentures, and that there were outstanding debentures for the aggregate sum of 730,000*l.*, but that all interest thereon had been paid up to July 1, 1891, inclusive, and that the company was going to issue bonds thereinafter referred to as "the bonds of the B series" for the aggregate sum of 300,000*l.*, bearing interest at 6*l.* per cent., and that these bonds should be secured in manner thereinafter expressed to the intent that, so far as regarded the property described in the schedule thereto, the charge for securing the bonds of the B series should rank in priority to the charge created by the debentures, the Manila company charged certain items of their property, which were described in a schedule, with the payment of the bonds of the B series, and undertook to execute a legal mortgage of the specified property to the Merchants Trust, Limited, as trustees for the B bond-holders. By the bonds the company agreed to pay the principal and interest secured by them, and they were declared to be issued with the benefit of the indenture of March 1, 1892.

The interest on the debentures having become more than

three months in arrear, the plaintiffs, who were debenture-holders, commenced their action on behalf of themselves and all other the debenture-holders, except the Guardian Investment Trust Company, against the Railway Company, the Guardian Investment Trust Company, and the Merchants Trust, Limited, as representing the B bond-holders, to enforce the debentures.

On June 27, the plaintiffs moved before North J. for an injunction to restrain the railway company from paying the interest on the B bonds, the receipts of the company being insufficient to pay the interest on the debentures after paying that on the B bonds.

There was a dispute whether the B bonds were issued before or after the expiration of three months from the time when the debenture interest payable on January 1, 1892, became due, but for the purpose of the argument it was agreed that they should be taken as issued after that time. That they were issued long before the commencement of the action was not disputed.

Farwell, Q.C., and *Disturnal*, for the plaintiffs. Assuming for the purpose of the argument that the B bonds were issued after March 31, on which day the interest upon the debentures became in arrear for three months, it is submitted that the security constituted by the debentures had by the express words of condition 2 ceased to "float," and had become "crystallized" before the issue of the bonds, and, consequently, that issue being a dealing with the property of the company, the bonds are invalid as against the debenture-holders, who are entitled to priority. The contract is that the company shall, notwithstanding the charge, be entitled to deal with their property until one of three given events shall happen. The first of those events happened on March 31, and thenceforth the company could not deal with their property to the prejudice of the debenture-holders. The ordinary rule that a "floating security" in favour of debenture-holders does not "crystallize" until either a receiver has been appointed on behalf of the debenture-holders, or an order has been made to wind up the company, does not apply where the debenture itself expressly provides, as it does here, that the security shall crystallize on the happening

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of some other event: *In re Horne & Hellard* (1), *Brunton* v. *Electrical Engineering Corporation.* (2)

[NORTH J. referred to *Taunton* v. *Sheriff of Warwickshire.* (3)]

Levett, Q.C., and *Abraham*, for the Manila company. A "floating security" continues to "float" until the holder takes some step to enforce it. If the plaintiffs are right, all the transactions of the company during the last two years may be set aside, and the business of the company would be paralysed. The second condition does not mean that the power to enforce the security is to come into operation the instant the default is made. The object is that the debenture-holders shall not be entitled to apply for the appointment of a receiver the instant default is made in payment of interest; they are not to apply for a receiver till the end of three months. The argument is that the debenture-holders are to be treated as if a receiver had been actually appointed at the end of the three months. That is clearly erroneous: *In re Colonial Trusts Corporation.* (4) The three months is a period of grace given to the company within which they may pay the interest. The debenture-holders are not to take proceedings to enforce their security until that time has expired, and till they take those proceedings the security still continues to float.

Whitehorne, Q.C., and *W. E. Vernon*, for a holder of B bonds. The debentures remain a "floating security" until the business of the company is brought to an end. Default in payment of interest for three months does not of itself bring the business to an end, though it may be made use of for that purpose.

C. E. E. Jenkins, for the Merchants Trust, Limited. The effect of the word "notwithstanding" in the condition is not to extend the charge, but to cut it down. It does not enlarge the remedy of the mortgagees. In *Wheatley* v. *Silkstone and Haigh Moor Coal Co.* (5), debentures contained the words "first charge," and yet it was held that the company could give priority to a mortgage of later date.

Latham, Q.C., and *A. R. Kirby*, and *Byrne, Q.C.*, and *Beaumont*, for other parties.

(1) 29 Ch. D. 736.
(2) [1892] 1 Ch. 434.
(3) [1895] 1 Ch. 734; [1895] 2 Ch. 319.
(4) 15 Ch. D. 465, 472.
(5) 29 Ch. D. 715, 724.

NORTH J., after reading the charge contained in the debenture, continued:—The words "by way of floating security" have a perfectly well-known meaning. If those words were omitted the debenture-holders would be clearly right in their present claim. The question is, whether the existence of those words makes a difference. The debenture is issued "subject to the conditions indorsed hereon," and if there is a condition limiting the time during which the security is to be "floating," the effect will be just the same as if the charge had been at first given by way of floating security for the time which is indicated by the condition. The only material condition for the present purpose is the second: "Notwithstanding the said charge the company shall be at liberty in the course and for the purpose of its business to use, employ, sell, lease, exchange, or otherwise deal with any part of its property." That is not the whole of the condition, but let me pause there for a moment to consider the effect of those words. Mr. Levett says that they have no operative effect, that they are merely an expansion of the phrase "floating security." Supposing the charge had not contained the words "floating security," then these words "notwithstanding the said charge the company shall be at liberty in the course and for the purpose of its business to use, employ, sell, lease, exchange, or otherwise deal with any part of its property," would amount to the same thing as saying that the security is a "floating security" as that phrase has been construed by the Court. I cannot, therefore, read these words of the condition as meaning nothing at all, but I think they were used for some purpose. I will now read the rest of the condition: The company is to be at liberty to carry on its business—putting it shortly—"until" what? Three things are mentioned. First, until default shall be made in payment of any interest for three months after it shall have become due; secondly, until an order of some court of competent jurisdiction shall have been made for the winding-up of the company; and thirdly, until a special or extraordinary resolution shall have been duly passed for the winding-up of the company. Therefore, three things are contemplated with reference to which the word "until" is used, and the direction that the company is to be at liberty to carry on its business, or, in

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North J.

other words, that the security is to be a "floating security," is, as I read it, until one of these three things takes place. Now, take the second—"until an order of some court of competent jurisdiction shall have been made for the winding-up of the company"—suppose that was done, would the security be a "floating security" after that? It is admitted that it would not. Take the third—"until a special or extraordinary resolution shall have been duly passed for the winding-up of the company." After that had been done, would the security be a "floating security"? I think it would clearly not. Although no doubt in *In re Colonial Trusts Corporation* (1), Jessel M.R. referred to two things which might prevent a security from "floating"—namely, the winding-up of the company or the taking possession of its property by a receiver—I do not understand him to mean that those are the only two things which could put an end to the "floating" of the security. I take it that an order of the Court to wind up the company, and a special or extraordinary resolution for winding-up the company, would have exactly the same operation upon a "floating security." Now, if the second and the third of the matters indicated by the word "until" would clearly have the effect of preventing the security from any longer "floating," why should not the first matter referred to by the word "until" have the same effect? The direction is that, notwithstanding the charge, the company shall be at liberty to carry on its business, until the Court winds it up, or until it winds itself up, or until three months' default has been made in payment of interest, after interest has fallen into arrear. Three things are indicated as pointing out the time at which the company is to be no longer at liberty to do what it is at liberty to do down to that time—namely, to carry on its business. In my opinion, therefore, upon the happening of any one of the three things indicated, the power or the licence given to the company to carry on its business would come to an end. The cases which have been referred to all bear upon the question of a "floating security," but none of them comes very near the present point, except *In re Horne & Hellard* (2), in which Pearson J. took the view (which

(1) 15 Ch. D. 465. (2) 29 Ch. D. 736.

is not disputed) that a debenture may by express terms make the security a "floating security" for some limited time indicated in the debenture itself. It was admitted, and I do not think it could have been disputed, that, if the debenture had in terms provided that it was to be a floating security for twelve months and no more; or if the same thing had been effected by saying that the company was to have the right to carry on its business for twelve months and no more; then by contract there would be a term limited during which the security was to "float," and at the end of which it was to "float" no longer. That, as it seems to me, is the meaning of the words used here.

Mr. Jenkins says that the phrase "notwithstanding the said charge" is inconsistent with that view. I do not so read it. Reading the whole condition, the company is to have power to carry on its business till certain things happen, and the security is to float until that time. "Notwithstanding the said charge" refers to the charge created as being one which, if there were nothing else, would be operative at once. But it is intended that something shall be engrafted upon that, and it is said that, "notwithstanding the charge," the company are to have the limited powers which are there conferred upon them. It seems to me that by the express terms of the contract the power of the company to carry on their business, and the continuance of the security as a floating security, come to an end when the interest has fallen into arrear, and has been in arrear for a term of three months. The real reason why the period of three months is given is this—It might be said that, if the interest was not paid on the very day on which it became due, it would be rather hard upon the company that the security should at once cease to float; and three months further time is given to them to find the money and pay the interest in arrear; and if it is paid within that time the non-payment on the due date is not to prevent the charge from continuing to float; but, if it is not paid at the end of three months after it is due, the rights conferred by the debenture are then to come into force. In my opinion, when the three months had expired, the licence given by the debenture to the company to carry on their business had run its course, and did not exist any longer. I cannot see

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that it was continued by inference from the use of the phrase "floating security," in the face of the express words that it is to continue for a limited time; which necessarily implies "and not afterwards."

I must grant an injunction to restrain the defendant company until the trial of the action or further order from paying the interest upon the B bonds.

W. L. C.

C. A.

The Manila company appealed. The appeal was heard on June 28, 1895.

Levett, Q.C., and *Abraham*, for the appeal. What we contend is that, as the debenture-holders had done nothing at the time the B bonds were issued, their security was still a floating security, and left the company at liberty to make mortgages which would take priority of it. A floating security is one which leaves the debtor at liberty to deal with his property in the course of his business, so as to leave him free to trade. In compensation for this the creditor gets into his security whatever arises from the trading. If the debentures ceased to be a floating security on April 1, 1892, the debenture-holders would have no lien on anything acquired after that day. A floating security of this kind may be made a definite security by the appointment of a receiver or by an order to wind up the company, or by a resolution for voluntary winding-up. The judge below was of opinion that clause 2 took away something from the company. We contend, on the other hand, that the clause was not intended to make the security become a definite one automatically at the end of three months, but to give the company three months' respite by prohibiting the taking steps by the debenture-holders to stop the business till the three months had expired. The debenture-holders might have come in and stopped the business on April 1, 1892, but they did nothing; they allowed the company to issue their B bonds, and now seek to get the benefit of the money.

Whitehorne, Q.C., and *W. E. Vernon*, for B bond-holders.

Farwell, Q.C., and *Disturnal*, for the plaintiffs. Where a floating charge is created there is first of all a charge, which is

turned into a floating charge by a proviso that, notwithstanding the charge, the company shall be at liberty to deal with its assets in the way of business. Here unusual language is employed. There is a charge from the first although the security is floating: *Driver* v. *Broad* (1), and, here, by the plain terms of the conditions, the security is only to be floating until three months after default. The Court ought not to strain the plain words of the condition by importing into them "until default for three months and an application for a receiver." There is a charge subject to a definite bargain limiting its effect.

[LINDLEY L.J. When the three months were out the debenture-holders might have interfered, but they did not. Could they leave the company to go on contracting debts and then say that those debts were not to be paid?]

There might be equities against the persons lying by, but that cannot affect the construction of these documents. The only case in the books resembling the present is *In re Horne & Hellard* (2), and it is strongly in our favour. The B bondholders took their security with their eyes open, for their trust deed recites the interest on the debentures to be in arrear.

Levett, Q.C., in reply.

LINDLEY L.J. This is an appeal from an order made by North J. granting an injunction to restrain the Manila Railway Company from parting with any moneys for the purpose of paying or otherwise paying or transferring the interest due on July 1 next from the railway company upon what are called B bonds. The case has been advanced on account of its pressing nature. I confess at first I thought the language of the debentures was such as to render the interpretation put upon it by North J. correct; but I did not then see how it would work, and on further consideration I have come clearly to the opinion that it cannot be supported.

The case turns upon the true construction of the debentures. Each debenture contains a covenant to pay the principal sum of 100*l.* at a future time, and in the meantime to pay interest at 6 per cent. on January 1 and July 1 in each year. Then comes

(1) [1893] 1 Q. B. 744. (2) 29 Ch. D. 736.

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the clause which gives the debenture-holder a charge on the assets of the company: "The company hereby charges, by way of floating security, all its property whatsoever and wheresoever, both present and future, including its uncalled capital, for the time being. This debenture is issued subject to the conditions indorsed hereon, and all persons may act accordingly." The only condition which is important is: (2.) "Notwithstanding the said charge the company shall be at liberty in the course and for the purpose of its business to use, employ, sell, lease, exchange or otherwise deal with any part of its property until default shall be made in payment of any interest hereby secured for the period of three calendar months after the same shall become due, or until an order of some court of competent jurisdiction shall have been made, or an extraordinary or special resolution shall be passed for the winding-up of the company." What is the effect of that? In the first place, a charge by way of floating security means, I suppose, what it says—that is to say, it is a charge. It is an equitable charge upon all the assets of the company, present and future, and "by way of floating security" means this, that the company, notwithstanding the charge, is to continue to carry on its business. Now, if it were not for the second condition, what would be the position of affairs? The position of affairs would be this, that the moment there was default in payment of interest a debenture-holder could immediately bring an action for a receiver, and so stop the business of the company. To prevent that, the second condition is inserted for the benefit of the company, to give them, as Lopes L.J. expressed it, three months' law. "Notwithstanding the said charge"—i.e., the charge created by the debenture—the company is to be at liberty to carry on its business, until default shall have been made in payment of interest for three months. Now we come to the real crux. What is to happen at the end of those three months? The condition says nothing about that, for the rest of the condition applies to the event of a winding-up which might take place within the three months, whether the debenture-holders liked it or not. Everything turns upon the point that nothing is said as to what is to happen at the end of the three months. From the absence of expression as to what is to

happen are we to draw an inference which will work and will make the whole machinery produce the end for which it is designed, or are we to draw an inference equally consistent with the words, which will scarcely work at all as a matter of business, and will produce the grossest injustice? It appears to me that when the Court is in that position, and has not to grapple with words, but with the absence of words, it ought to draw that inference which is reasonable, having regard to the language which is used and the objects of the document in which that language is found. Now, according to the construction put upon this condition by the learned judge, this consequence would happen, that the debenture-holders could, if they chose, allow the company to go on after the three months, allow debts to be contracted, and then say that none of them shall be paid, although the company is still carrying on business. That I call a monstrous result. The other construction comes to this: "It depends upon you, the debenture-holders, what is to be done. If you like to let the company go on your charge shall remain a floating security. If you prefer stopping the company, you can at the end of three months get a receiver and manager." That appears to me to be the true construction. It is not just that the debenture-holders should allow the company to go on dealing with their assets, and then defeat those dealings by treating their security as having become a definite security at the end of the three months.

I think therefore that the appeal ought to succeed.

LOPES L.J. I am of the same opinion. I had at first considerable doubt on the language, but after careful consideration I think the construction put upon it by my brother Lindley is the right one. I think this clause is inserted in the interests of the company, in order to give them the benefit of the three months which they would not have had except for this condition.

RIGBY L.J. I am of the same opinion. This debenture and the condition attached to it are not expressed in the clearest possible language, but I think it sufficiently clear for the purpose. In the body of the debenture a charge is created upon

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all the property of the company, but it is a charge "by way of floating security," so when that charge is referred to again, what is referred to is a charge by way of floating security. Mr. Farwell ingeniously argued that the creation of a charge was one thing and the making it a floating security was a different one; and that you could refer to the charge, leaving out of view it being a floating security. I do not think that is sound.

I will only say a few words about the way in which the doctrine of floating securities grew up. If you charge all your property you charge each individual item of it. But the Courts at once saw that if you charge an undertaking it is not intended that that undertaking should be immediately stopped and wound up; it is the object of both parties, that until events happen which amount to default, the business shall be carried on, and if the business is carried on it follows as a matter of necessity that the company must withdraw some part of its assets, though charged, from the general charge, substituting of course the assets which are acquired in place of those which are released, not merely those that cover the purchase-money, but those which in the course of business are added to the company's property. So we get a very adequate idea, for the purpose of this case at any rate, of what is meant by floating security, the object being that the business of the company shall for the benefit of both parties be carried on until some default is made.

Then we come to the second condition, and I think we are bound to construe it as if the words were: "Notwithstanding the said charge by way of floating security the company shall be at liberty"—to do something which, but for this clause, they would not be entitled to do. Now, it would be contradictory to the nature of a floating security to suppose that they could not carry on business so long as it continued a floating security. What the condition was intended to enable them to do was to carry on business for a certain period, namely, until the expiration of three calendar months after the interest has become due or (this will lessen the period) until a winding-up order or an extraordinary resolution to wind up. In thus construing the conditions, I do not think I am travelling out of its language in the least, but am giving the literal interpretation of the words.

It is a suspension in favour of the company for three months of the right of the debenture-holders—saying nothing as to what is to take place at the expiration of that period. Of course, if that period was brought to an end by a winding up, nothing requires to be said at all. The winding up stops the business of the company, and makes the debenture charge a charge upon the existing assets without power to the company to carry on business. But if the period ends by the effluxion of the three months, the charge is to be as though this condition had not been contained in the debenture, it becomes a simple ordinary floating security. The debenture-holders are under no obligation to come in and obtain the appointment of a receiver and thereby put an end to the business, though they may do so if they think it to their advantage. On the other hand, if they do not think it to their advantage, they permit the floating security to go on as a floating security, with the necessary consequence that the company in the course of its business may mortgage their assets notwithstanding that security, and give a good title to the mortgagees. I do not think that we are going contrary to *In re Horne & Hellard* (1) before Pearson J. The charge there was totally different, and it was a vendor and purchaser's case.

Solicitors: *Bompas, Bischoff & Co.; Davidson, Morriss & Co.; Beaumont & Son; Ashurst, Morris, Crisp & Co.; Murray, Hutchins & Stirling.*

(1) 29 Ch. D. 736.

H. C. J.

C. A.
1895
July 13.

In re MILLS' TRUSTS.

Bankruptcy—"Order or Disposition"—"Reputed Owner"—"True Owner"—Consent—Settlement—Trustees declining Trusts—Cestuis que Trust—Married Woman—Restraint on Anticipation—Infants—Bankrupt Law Consolidation Act, 1849 (12 & 13 *Vict. c.* 106), *ss.* 125, 141—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 44 (*iii.*).

Where the trustees named in a settlement of property of a person who afterwards becomes bankrupt have never executed or had any knowledge of the settlement, or, on being informed of it, decline the trusts, the beneficiaries, and not the trustees, are the "true owners" for the purpose of giving the necessary "consent and permission" to the property being in the "order or disposition" of the bankrupt as "reputed owner" at the commencement of his bankruptcy, so as to render the property available for his creditors: and such consent and permission can only be effectually given by the beneficiaries when they are persons capable of giving it, and not, for instance, married women restrained from anticipation or infants.

Compare Bankrupt Law Consolidation Act, 1849, s. 125, and Bankruptcy Act, 1883, s. 44 (iii.).

UNDER the trusts of the will, dated in 1836, of his uncle John Mills, deceased, John Mills Wills, surgeon, became absolutely entitled, in reversion expectant on the death of his mother, Sarah Wills, to one-eighth share of certain trust funds, representing the testator's residuary estate.

By a post-nuptial settlement made in 1861 between the said J. M. Wills of the one part, and two trustees of the other part, after reciting the title of the said J. M. Wills to the said reversionary interest (together with reversionary interests in other trust funds), and also that the said J. M. Wills, having received moneys belonging to the separate estate of his wife, Grace Leeman Wills, to a considerable amount, was on that account, and also on account of his natural love and affection for his said wife and their children, desirous of settling his share and interest in the said several trust funds upon trusts for her and their benefit: the said J. M. Wills assigned to the said trustees all and every the sums of money, stocks, funds, and securities to which he was or might become entitled as aforesaid, to hold the same upon trust, when the said several trust premises should

become payable, to recover and get in the same and invest them in the names of the said trustees jointly with the name of his said wife, if she should then be living, in the securities therein mentioned, and should during the life of his said wife pay the income to her for her separate use without power of anticipation; and it was declared that after her death the said trustees should, if the said J. M. Wills should be then living, stand possessed of the said investments and the income thereof upon trust for such persons as his said wife should by deed or will appoint, and in default of appointment upon trust for the children of himself and his said wife in equal shares, the share of any child dying under twenty-one to go to the survivors; and if no child attained twenty-one, then upon trust for the said J. M. Wills absolutely; but if he should die in the lifetime of his said wife, then upon such trusts in favour of her children by him as he should by will appoint; and in default of such testamentary appointment upon trust for the said children in equal shares, subject to the provision as to survivorship thereinbefore contained.

On July 3, 1865, J. M. Wills, the settlor, was adjudicated bankrupt, and an assignee was duly appointed in the bankruptcy.

The trustees named in the settlement never executed it, or acted in the trusts thereof, and no notice of it was given to them until some time after the bankruptcy, when they "rejected the trusts thereof," though without executing any formal deed of disclaimer. Neither was any notice of the settlement given to the trustees of the will of John Mills prior to the bankruptcy.

Sarah Wills, the mother of J. M. Wills, died on November 7, 1866, whereupon his one-eighth share under his uncle's will fell into possession. This share consisted of 599*l.* 3 per cent. Consols, 80*l.* new 3 per cent. annuities, and a small sum of cash representing dividends on those stocks since the death of Sarah Wills.

In April, 1868, the surviving trustee of the will paid these funds into court under the Trustee Relief Act. Nothing more was done in the matter until 1894, when a new assignee was appointed in the bankruptcy in the place of the original assignee,

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who had died twenty years before. The fund, which had been accumulating, and now consisted of 1439*l.* 13*s.* 3*d.* New Consols and a small sum of cash, had been inserted in the list of "Dormant Funds" in the *London Gazette*.

The assignee in the bankruptcy presented a petition asking for payment out of the fund to him, on the ground that, notwithstanding the settlement of 1861, the share to which J. M. Wills became entitled under the will of his uncle remained in the order and disposition of the said J. M. Wills and vested, under s. 141 of the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), in his assignee in bankruptcy.

J. M. Wills and his wife were both still living, and they had had two children, both of whom were also living and were infants at the dates of the settlement and of the bankruptcy. One of them, a married daughter, was made a respondent to the petition, together with her husband. From the evidence it appeared that J. M. Wills was solvent at the date of the settlement; also that the settlement was made by arrangement between himself and his wife in consideration of her having handed over to him a sum of 600*l.* which had come to her under her father's will, and which he, the husband, proposed to utilize in connection with a partnership business into which he was then desirous of entering.

The petition was heard by Kekewich J., who on April 30 made an order dismissing it with costs, holding that the settlement was valid, and that, although the trustees of the will of John Mills had no notice of the settlement before the bankruptcy, the inference from the facts was that they were aware of its existence before any claim to the fund was made by the assignee in bankruptcy, and that therefore the cestuis que trust under the settlement were entitled in priority to the assignee. His Lordship considered it unnecessary to decide who was the "true owner" of the fund within the Bankrupt Law Consolidation Act, 1849.

From that order the assignee appealed. The appeal was heard on July 13, 1895.

Muir Mackenzie, for the appellant. In *Hensley* v. *Wills* (1)

(1) 16 L. T. (N.S.) 582.

Wood V.-C. held that another reversionary interest of this settlor comprised in the settlement of 1861 was in his "order or disposition" at the time of his bankruptcy within s. 125 of the Bankrupt Law Consolidation Act, 1849, following *In re Rawbone's Trust.* (1) That decision really covers the present case, and therefore the reversionary interest now in question became vested in the assignee of the bankrupt under s. 141.

[LINDLEY L.J. But the property must be in the order or disposition of the bankrupt "with the consent and permission of the true owner." It seems to me that the cestuis que trust are the "true owners" within the section.]

If that is so — if in such a case a single cestui que trust happens to be an infant, the reputed ownership clause, whether it be s. 125 of the Act of 1849, or s. 44, sub-s. iii., of the Bankruptcy Act, 1883 (2), cannot apply. Here every one who could consent did so, for under the settlement the husband and wife had in their own power the disposition of the trust funds; so that the case comes within the principle of the reputed ownership clause, which is that the clause must operate where persons who ought to give notice to the parties from whom the trader expects to receive payment, that is, the parties who hold the property at the order and disposition of the trader—such parties in the present case being the trustees of the will of John Mills—

(1) 3 K. & J. 476.

(2) Sect. 125 of the Bankrupt Law Consolidation Act, 1849, is, so far as material, as follows:—

"That if any bankrupt at the time he becomes bankrupt shall, by the consent and permission of the true owner thereof, have in his possession, order, or disposition any goods or chattels whereof he was reputed owner, or whereof he had taken upon him the sale, alteration, or disposition as owner, the Court shall have power to order the same to be sold and disposed of for the benefit of the creditors under the bankruptcy. . . ."

Sect. 44 of the Bankruptcy Act, 1883, is, so far as material, as follows:—

"The property of the bankrupt divisible amongst his creditors, and in this Act referred to as the property of the bankrupt . . . . shall comprise the following particulars:

* * * * *

"(iii.) All goods being, at the commencement of the bankruptcy, in the possession, order, or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof; provided that things in action other than debts due or growing due to the bankrupt in the course of his trade or business, shall not be deemed goods within the meaning of this section."

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abstain from doing so: *Joy* v. *Campbell.* (1) The proper view seems to be that the trustees were the "true owners": it would be paradoxical if the property was vested in no one as "true owner."

[RIGBY L.J. Suppose the trustees were the "true owners," they could not have given any "consent and permission," for they never heard of the settlement.]

When you find that persons who do know of the settlement, and have substantially the whole beneficial interest under it, but do not give notice, the reputed ownership clause applies.

[RIGBY L.J. But not to destroy the interests of beneficiaries who do not know of the settlement and cannot consent. You must shew who the true owner is and who can consent.]

The husband and wife have the power of disposition between them.

[RIGBY L.J. That is not so: the wife's power is general, and the husband's is among children only, and both powers are conditional.]

Reed, Q.C., and *Dibdin*, for the respondents, the daughter and her husband. It is clear from *In re Rawbone's Trust* (2) that no "consent" can be imputed to the "true owner," unless he has knowledge of, or means of knowing, the bankrupt's interest.

[They were stopped by the Court.]

Method, for the official solicitor.

LINDLEY L.J. I entertain no doubt as to this case. Mr. Wills was entitled in reversion to one-eighth of the residuary estate of his uncle, and that one-eighth was vested in him when he made the settlement to which I am about to refer. That settlement he made in 1861, some time before he became bankrupt. He was a married man and had two children. The settlement was a post-nuptial settlement, and from the evidence it appears that it was something more than a voluntary settlement. Under that settlement he assigned his one-eighth share to trustees upon trusts for his wife and children, with an ultimate trust, in default of children attaining twenty-one, for himself, but his wife having a conditional general power of appointment by deed or

(1) 1 Sch. & Lef. 328; Tu. L. C. (Merc. Law) 3rd ed. p. 695.
(2) 3 K. & J. 476.

will, and he having a conditional power of appointment among children only. It is clear that the trustees never executed the settlement, and that they knew nothing about it. The assignee in bankruptcy claims this fund on the ground that the reversionary interest was in his order and disposition with the consent of the true owners.

The Act applying to this case is the Bankrupt Law Consolidation Act, 1849, which, in s. 125, says this: [His Lordship read the section, and continued:—]

Now, it is not in dispute that in 1849 this kind of property was included in the description of "goods and chattels" within the meaning of this section. The question, then, is whether this property was in the order or disposition of the bankrupt "by the consent or permission of the true owner." Who was the "true owner"? If the trustees had accepted the trusts, they would have been the true owners: that has been decided over and over again. But here the trustees never executed the deed, nor did they know anything about it. Even if the property vested in them that would not of itself be sufficient, for the section requires that the property should have been in the order or disposition of the bankrupt "by the consent and permission" of the true owner; and such consent and permission would have to be proved. If however the true view is—as, under the circumstances, I think it is—that the trustees were not the true owners, but that the cestuis que trust were, there is this difficulty, that two of the cestuis que trust were infants and could not consent. Therefore it is impossible for the assignee in bankruptcy to bring himself within this section. This is fatal to his title, and the appeal must be dismissed.

LOPES L.J. The question is whether this fund was in the order or disposition of the bankrupt at the time of the bankruptcy with the consent of the true owner. I am most distinctly of opinion that it was not. With regard to the settlement, I presume that, if the trustees had accepted the trust and had duties to perform, they would have been the true owners within the statute. But, as far as we can gather, they knew nothing of this settlement at all: they knew nothing about any trust. Therefore they could not consent as the true owners.

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Then, who were the true owners? The cestuis que trust; the persons beneficially entitled; and some of these were infants and could not consent. The requirements of the 125th section of the Act of 1849 could not be complied with. Accordingly, in my opinion, the appeal fails.

Rigby L.J. I am of the same opinion. The 125th section, which takes one man's property to pay another man's debts, would be very oppressive if it were not hedged about in some way or other; and the main point is that the property, whatever it is, should be in the order or disposition of the bankrupt by the consent and permission of the true owner. This consent and permission is an essential part of the title of the bankrupt's trustee. Whether, in the present case, the true ownership was vested in the trustees of the settlement or not, it is clear that no consent or permission was given by them, for they never heard of the deed. Supposing the beneficiaries were the true owners, there again no consent or permission was or could be given. In the first place, the income was payable to the wife for her life for her separate use, and she could not consent to part with it, because she was restrained from anticipation. Then there were children, who were infants, and there might be other children not yet come into existence. If the wife were to die in the husband's lifetime—an event not yet ascertained—she might have the power of taking the property out of the settlement. It is plain she never did exercise this power so as to give the property to her husband's creditors, even if she could have done so. She had no power of taking away the property from the children. The two children already born were infants. Those children could not consent, and of course unborn children could not. Only the true owners could consent, and no true owners within the meaning of the Act did consent.

The appeal must therefore be dismissed.

Appeal dismissed with costs.

Solicitors: *R. Ballard; Pitman & Sons, for Jones, Macintosh & Dixon, Cardiff; Official Solicitor.*

G. I. F. C.

BROOK *v.* MANCHESTER, SHEFFIELD AND LINCOLNSHIRE RAILWAY COMPANY.

CHITTY J.
1895
July 17, 25.

[1895 B. 1842.]

Railway Company—"Part of any House or other Building or Manufactory"—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *s.* 92.

Part of a house was used for the purposes of a manufactory, and the other part was let to an under-tenant and not used for the purposes of the manufactory:—

Held, that the part last mentioned was part of a manufactory, and a railway company proposing to take it was bound under s. 92 of the Lands Clauses Act to take the whole of the manufactory.

THE plaintiffs, who were waste manufacturers, were the lessees of certain land and buildings and manufacturing premises situate between Cromford Street and Waterway Street in the town of Nottingham, which land and premises were numbered 1 to 8 on the plan produced.

The building numbered 3 on the plan was described as a three-storey brick building, the ground-floor of which was underlet by the plaintiffs, while the first and second floors were divided in about the middle by a temporary wooden partition, the northern portion of which floors was occupied by one Sansom as a tenant at will of the plaintiffs, and the southern portion was occupied by the plaintiffs for the purposes of their business.

In April, 1895, the defendants, requiring part of the plaintiffs' premises for the purpose of their undertaking, gave notice under the powers of their Act passed in 1893, with which the Lands Clauses Act was incorporated, to take the land and premises in the notice to treat mentioned, being about one-fifth of the manufactory, and including the northern portion of No. 3 in the occupation of Sansom, and also a portion of the yard around which the whole of the premises comprised in the lease had been built.

The plaintiffs, in the same month of April, gave the defendants a counter-notice, requiring them to purchase the whole of their

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interest of and in all the lands and premises shewn on the plan and numbered 1 to 8, and claimed the sum of 7740*l.* as the purchase-money and compensation.

The company refusing to accede to this claim, the plaintiffs commenced this action, asking for a declaration that the defendants were not entitled to take any part of the premises belonging to the plaintiffs without taking the whole or duly paying the purchase-money or compensation for the whole, and for an injunction to restrain the defendants from entering on the part comprised in the notice to treat.

Upon the motion coming on upon May 30 it stood over, the defendants undertaking to deposit the sum of 7740*l.* in joint names, and the plaintiffs undertaking on such deposit being made to give possession to the defendants.

Upon the motion now coming on, it was agreed that the hearing should be taken as the trial of the action. There was evidence that the whole of the yard including part of the portion comprised in the notice to treat was used for the purposes of the business.

Whitehorne, Q.C., and *Edward Ford*, for the plaintiffs. The land which the defendants require, and upon which the building No. 3 stands, is part of the plaintiffs' manufactory within the meaning of s. 92 of the Lands Clauses Act. Although the northern portion of No. 3 is not now used for the purposes of their manufactory, it none the less forms part of it, and they may at any time require the use of it. It is not necessary that every part of a manufactory should at the time of the notice to treat be actually in use. We submit that the plaintiffs' counter-notice is good.

[They referred to *Richards* v. *Swansea Improvement and Tramways Co.* (1); *Sparrow* v. *Oxford, Worcester and Wolverhampton Ry. Co.* (2); *Spackman* v. *Great Western Ry. Co.* (3); *Furniss* v. *Midland Ry. Co.* (4); *Lord Grosvenor* v. *Hampstead Junction Ry. Co.* (5); *Harvie* v. *South Devon Ry. Co.* (6)]

(1) 9 Ch. D. 425.
(2) 2 D. M. & G. 94.
(3) 1 Jur. (N.S.) 790.
(4) L. R. 6 Eq. 473.
(5) 1 De G. & J. 446.
(6) 32 L. T. (N.S.) 1.

Farwell, Q.C., and *Macnaghten*, for the defendant company. The company take no part of the manufactory. The property taken is let off to a tenant, and is not used by the plaintiffs at all. It can, therefore, at the utmost be part of a building. The term "building" within s. 92 of the Lands Clauses Act depends on structure, not on user; and even if No. 3 is held to be a building, the company do not "require" within the section more than that part of it which is not used by the plaintiffs. The plaintiffs cannot by requiring the defendants to take the residue of the building say that the company have thereby required part of the manufactory: the section cannot have a double operation given to it, so as to allow the plaintiffs first to compel the company to take under the head "building" a structure part of which they use as a manufactory, and then to say that they have now taken part of a manufactory and must take the whole. The company cannot be said to "require" that which the plaintiffs compel them to take. The word "require" refers to the notice to treat.

[They referred to *Loosemore* v. *Tiverton and North Devon Ry. Co.* (1)]

Whitehorne, Q.C., in reply.

CHITTY J. The plaintiffs claim an injunction founded on the rights which they assert are vested in them under the 92nd section of the Lands Clauses Consolidation Act, 1845.

The railway company have given notice to take a part of a property. The plaintiffs have given them a counter-notice to take the whole of the property, and they must stand or fall by their counter-notice. The defendants say the counter-notice is bad, because it requires them to take more than they are bound to take under the 92nd section.

The plaintiffs' case is that the defendants require part of a manufactory, and they assert that they are entitled by virtue of their counter-notice and the section to require the defendants to take the whole of the manufactory. It is not necessary that I should give a detailed description of all the different parts of the property. I will deal with the property No. 3. Now, No. 3

(1) 22 Ch. D. 25; 9 App. Cas. 480.

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may be taken to be and looked upon structurally as one house; it consists of these particulars. The ground-floor is in the occupation of two tenants of the plaintiffs. It is divided on the ground-floor by an internal wall only. Passing on to the first and second floors of the building, the southern portion is occupied by the plaintiffs as part of their manufactory. The northern part of those floors is occupied by a tenant at will of the plaintiffs named Sansom, and these two floors are divided by rough wooden partitions so as to mark off the part occupied by the plaintiffs and the part occupied by Sansom, and in the wooden partitions there is a door of communication. The rough partition and the wall on the ground-floor can be readily removed in the course of a few hours.

The defendants by their notice to treat propose to take the northern portion of No. 3, no part of which portion is used by the plaintiffs as part of their manufactory. It is plain that if the plaintiffs had given a counter-notice requiring the defendants to take the whole of No. 3, such counter-notice would have been good, because the defendants in that case would be proposing to take a part of a house. But the defendants say that they do not require to take part of a manufactory, because they say that they only require part of the house in which the manufacture is carried on, that part which they require being a part of the house in which the manufacture is not carried on.

Now, to ascertain what is a manufactory, regard must be had, and perhaps principally, to the user at the time of the notice to treat. It would not be necessary that every part of what would be reasonably called a manufactory should actually be in use at the time for the purpose of manufacture; for instance, there might be a large manufactory, and some part of it, say a large room, might not be required for the purpose of the business. Still, as it was all within the walls, although it was not then in use for the purpose of the business, the rest of the building being sufficient, in my opinion that makes no difference as to that part being part of the manufactory. I make this observation to guard myself against appearing to overstrain the question of user. Practically it must be used as a manufactory.

Now, are the defendants right in their contention? I agree

that all Acts of Parliament must be construed fairly and according to the intention of the legislature as shewn in the Act itself.

Hall V.-C., in the case of *Richards* v. *Swansea Improvement and Tramways Co.* (1), uses these terms: "As was said by Lord Westbury, who, to use his own expression, was favourable to companies rather than to the individual, 'You must construe it,'" that is the 92nd section "'in a liberal sense.' I, construing it in a liberal sense, hold that all the premises have something to do with and fairly constitute a part of the manufactory within the terms of the Act of Parliament." Cotton L.J. on the appeal said: "Although I do not at all think that we ought to construe this liberally to favour the landowner, yet we ought to construe it reasonably and fairly, having regard, of course, to previous decisions, and having regard to this, that the object and intention of this section was evidently to give a certain protection to landowners, to persons whose property was taken away from them against their will, so that no person should be required to sell a fraction only of that which ought to be regarded as a unit, when he might be very materially prejudiced by having left on his hands certain fractions only of that unit, not capable of being used efficiently when one fraction had been taken away from it. What we have to do is to construe the section fairly."

Endeavouring to construe the section fairly, I come to the conclusion on this point that the counter-notice is good. I think that the argument presented by Mr. Farwell is ingenious and refined; but, in my opinion, where a railway company proposes to take part of a building, part of which building is used as a manufactory, they are in substance claiming to take part of the manufactory within the fair meaning of the 92nd section, and I do not think it reasonable to adopt this refined construction.

It is not necessary for me to travel through all the authorities. It is quite plain that the southern portion of No. 3 is used, and was used at the time of the notice to treat, as part of the manufactory; and I hold that the other portions of the property are part of the manufactory.

[His Lordship then commented on the evidence as to the user

(1) 9 Ch. D. 425, 429, 437.

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of the yard, and held that the portion of the yard which the defendants required to take was part of the manufactory, and that on this ground also the defendants were bound to take the whole of the manufactory.]

Solicitors: *Lee, Ockerby & Everington, for J. & A. Bright, Nottingham; Cunliffes & Davenport, for Lingard-Monk, Manchester.*

G. M.

NORTH J.
1895
June 26.

In re JEFFERY.
ARNOLD *v.* BURT.

[1895 J. 496.]

Infant—Maintenance—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 43—*Contingent Interest—Income.*

Property was settled on trust for such members of a class (capable of increase) as should attain twenty-one :—

Held, that the accumulated income was divisible into as many shares as there were members in existence; that one share was payable to each adult; and one share was applicable under s. 43 of the Conveyancing Act, 1881, for the maintenance of each infant.

THE testator in this summons by his will settled his residuary real and personal estate, subject to certain annuities, upon trust for all and every the then present and future born children of his son Clayton William Jeffery, all and every the then present and future born children (except William Charles Burt) of his daughter Matilda Jane Burt, and all and every the then present and future born children of his daughter Paulina Mary Burt, who being a son should attain twenty-one, or being a daughter should attain that age or marry, the respective shares of granddaughters not born in his lifetime to be for their separate use, and the respective shares of grandsons and granddaughters born in his lifetime to be subject to the trusts thereinafter declared respecting the same. The will contained declarations settling the respective shares of his grandchildren born in his lifetime on such grandchildren for life with remainders to their children.

An application was made by some of the beneficiaries in the matter of the trust of the will of the testator in November, 1890, for the determination of the question how the surplus of the income, after paying the subsisting annuities, was applicable. On that occasion his Lordship held that the beneficiaries who had attained twenty-one were entitled to the whole of the surplus income then accrued, but did not make any order as to future income : *In re Jeffery, Burt* v. *Arnold.* (1)

(1) [1891] 1 Ch. 671.

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The present application was by way of originating summons taken out by the trustees of the testator's will. The defendants were the children of Matilda Jane Burt (other than William Charles Burt), and the children and grandchildren of Paulina Mary Burt. The summons asked for the determination of the Court whether the whole surplus income of the residuary estate of the said testator belonged exclusively to such of the grandchildren of the said testator as have for the time being attained their majority in equal shares: or to such adult grandchildren as aforesaid, and contingently to the infant grandchildren or grandchild of the said testator: and, in the latter case, whether the plaintiffs as trustees had power under the Conveyancing and Law of Property Act, 1881, s. 43, or otherwise to pay or apply the contingent shares of the infant grandchildren in such surplus income for or towards their maintenance and education during their respective minorities?

The testator's son Clayton William Jeffery was alive and married; he had no children. The testator's daughter Matilda Jane Burt was now dead; she had, besides William Charles Burt, two children, both living and of age, but not married. The testator's daughter Paulina Mary Burt was alive, living apart from her husband. She had nine children, all born in the lifetime of the testator and now alive, of whom six were of age and three minors. There were three grandchildren of Paulina Mary Burt, all under age.

Curtis Price, for the plaintiffs.

Coltman, for the adult grandchildren. The Court will follow its former decision in this matter, which was made between the same parties on the same subject-matter. The case is not within the decision of the Court of Appeal in *In re Holford* (1), because in that case the class was closed, and it could be predicated with certainty that those who attained twenty-one would take, at least, a certain share. In this case the shares are liable to diminution. If it is to be held that the adults are not entitled to the whole income, the infants are not entitled to have what does not belong to the adults applied for their benefit,

(1) [1894] 3 Ch. 30.

because the rights of unborn members of the class have to be protected.

Seddon, for great-grandchildren.

NORTH J. What I must do is quite clear. I took a certain view of the law in *In re Jeffery, Burt* v. *Arnold* (1), and afterwards in *In re Adams* (2); but two of the judges in the Court of Appeal have said expressly that *In re Jeffery* (1) was wrongly decided. I there decided how the income which had accrued due was to be applied. That is all past and done with. I am now asked to make a declaration as to income which at that time had not accrued due. If nothing else had taken place since, I should have followed the same lines and come to a similar conclusion. But nothing was then adjudicated upon as to future income, and I cannot see that the question is res judicata. I do not think any difficulty arises on this ground. I there laid down a principle which I should have followed now, but for the fact that in the subsequent case the Court of Appeal, in *In re Holford* (3), on, no doubt, a different will, came to a different conclusion. But two of the three judges expressly said that *In re Jeffery* (1) was wrongly decided in confining the income to those who had attained twenty-one, and excluding those born who had not attained twenty-one. Mr. Coltman endeavours to distinguish this case from that, because here the class is capable of increase, while in that case it was not. I do not see any reasonable distinction in that fact. The Court of Appeal having said I was wrong in my former decision, I do not intend to follow it now. As to what I did then decide there has been no appeal, and I cannot vary it now: it could only be varied by the Court of Appeal. But there is no case of res judicata with respect to what is now before me, and I must do what I consider the Court of Appeal would do in this case, having regard to what was said in *In re Holford*. (3) I hold that the income is not to be divided among those only who have attained twenty-one.

Wright Taylor, for the grandchildren under age. As it has been held that the adult children are not entitled to the whole income,

(1) [1891] 1 Ch. 671. (2) [1893] 1 Ch. 329.
(3) [1894] 3 Ch. 30.

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those under age will be entitled to a part if they attain twenty-one. Therefore, the case of *In re Dickson* (1) does not apply, and the interest of unborn children will not be taken into account: *Mills* v. *Norris* (2) is in point.

NORTH J. I consider the case of *In re Holford* (3) much more in point. There Lindley L.J. says (4): "There is good sense in saying that the income of property given contingently to a class of persons belongs to its members for the time being, as against persons who are only entitled if and when the class ceases to exist; but there is no sense in saying that one of a class takes the whole income, in which other persons belonging to the class have already a contingent interest which may become absolute. In *Mills* v. *Norris* (2) and *Scott* v. *Earl of Scarborough* (5), the question for decision was whether some members of a class were entitled to the income of property given to them and others of the same class who were not yet born, and the answer was 'Yes.' The decision was obviously reasonable and just. To treat the future possible rights of unborn persons as existing rights, even if only contingent, would have been to depart from sound principles with no sufficient justification." The income in hand will be divided into eleven parts, the trustees will pay one part to each of the adults, and I will declare that they have power under s. 43 of the Conveyancing Act, 1881, to apply the other three parts for the maintenance and education of the respective infants.

Solicitors for adults: *Whitehouse & Etherington, for Tylee & Mortimer, Romsey.*

Solicitor for all other parties: *J. J. Harlow, for Goater & Blatch, Southampton.*

(1) 29 Ch. D. 331.
(2) 5 Ves. 335.
(3) [1894] 3 Ch. 30.
(4) Ibid. 46.
(5) 1 Beav. 154.

D. P.

HOWARD *v.* FANSHAWE.

STIRLING J.

1895

May 7, 8; *June* 26, 29.

[1894 H. 2418.]

Lessor and Lessee—Peaceable Re-entry—Forfeiture of Lease—Right of Lessee to Relief—Bankruptcy of Lessee—Assignment of Lease by Trustee in Bankruptcy—Chose in Action—4 *Geo.* 2, *c.* 28, *s.* 2 (*Preamble*)—*Common Law Procedure Act*, 1852 (15 *&* 16 *Vict. c.* 76), *s.* 212—*Bankruptcy Act*, 1883 (46 *&* 47 *Vict. c.* 52), *ss.* 44, 168.

The jurisdiction to grant to a lessee relief against the forfeiture of his lease for non-payment of rent is not confined to cases where the lessor has recovered possession by legal process, but extends to cases where the lessor has recovered peaceable possession without the assistance of any court.

In such a case an order may be made under s. 212 of the Common Law Procedure Act, 1852, giving the lessee relief in equity, and declaring that he may hold and enjoy the demised lands according to the lease made thereof without any new lease.

The right of a lessee to be relieved from the forfeiture of a lease is a chose in action which vests in his trustee in bankruptcy, and the trustee is entitled to sell such right and to assign it to a purchaser.

Trial of Action.

Some time previously to December, 1892, the defendant, John Gaspard Fanshawe, entered into an agreement with a builder named Lewis Etheridge for the erection of certain dwelling-houses in Stanley Road, Dagenham, and for the granting to him of leases of the houses so to be erected. On December 2, 1892, the defendant granted to Etheridge a lease of No. 5, Stanley Road for ninety-nine years from March 25, 1892, at a peppercorn rent for the first year, and thereafter at the rent of 5*l.* paid quarterly. When this lease was granted, No. 5, Stanley Road was not completed, and Etheridge could not have required it to be made; but, in the view which the Court took of the evidence, the lease was actually given to him by the defendant for the express purpose of raising money thereon. On December 14, 1892, Etheridge deposited the lease with the plaintiff by way of security for an advance of 200*l.* and interest. In like manner, a lease of No. 1, Stanley Road was granted to Etheridge on December 22, 1892, and was on April 14, 1893, deposited with the plaintiff to secure another sum of 200*l.* and interest.

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On February 6, 1894, Etheridge was adjudicated a bankrupt. At this date the houses Nos. 1 and 5, Stanley Road were incomplete. They appeared to have had front doors, but neither back doors nor windows.

On February 21, 1894, three quarters' rent being in arrear and unpaid, a clerk of Mr. Moore (a land agent carrying on business at Bedford Row, who acted under instructions given him by the defendant's solicitors) went to Nos. 1 and 5, Stanley Road, entered each of those houses by the back door, and, after having been in each, affixed to the front door a notice to the effect that possession had been taken on behalf of the defendant. On February 23, 1894, the defendant's solicitors, by letter, gave the plaintiff's solicitor notice that possession had been taken "in consequence," as was stated therein, "of breaches of covenant." It was further stated that possession was taken on February 21.

A correspondence then took place between the solicitors of the parties with reference to the claims which the defendant made against Etheridge for advances. The defendant required as a term of granting new leases to the plaintiff that he should pay a proportion of those advances; and the plaintiff, by a letter from his solicitor on May 4, 1894, declined to pay the sums claimed by the defendant's solicitors.

Thereupon defendant's solicitors threatened to sell the houses.

On June 28, 1894, the plaintiff tendered to the defendant the sum of 9*l.* 7*s.* 6*d.*, the amount of ground-rent in arrear; but the tender was rejected.

By a deed dated July 5, 1894, the trustee in the bankruptcy of Etheridge, in consideration of 5*l.*, assigned to the plaintiff all his interest in Nos. 1 and 5, Stanley Road.

On July 6, 1894, the plaintiff brought this action, claiming possession of the properties comprised in the leases at the rents, and under and subject to the lessees' covenants in such leases respectively reserved and contained; and relief from any forfeiture of the said leases respectively on payment of the rents thereby respectively reserved, or otherwise on such terms and conditions as the Court should think fit.

Each of the leases in question contained a proviso enabling the

lessor to re-enter on any part of the demised premises in the name of the whole "if and whenever any part of the rent hereby reserved shall be in arrear for twenty-one days next after the same shall have become due, whether the same shall have been legally demanded or not, or if the lessee his executors administrators or assigns shall not truly observe and perform all and singular the covenants and provisions hereinbefore contained"; "and thereupon" it was provided "the term hereby granted shall absolutely determine."

On February 21, 1894, rent was in arrear under both leases; but it was not alleged at the trial that any breach of covenant had been committed which would justify the re-entry; and the question was whether under these circumstances the plaintiff was entitled to be relieved from the forfeiture.

Stroud, for the plaintiff. The right of re-entry on forfeiture of a lease for non-payment of rent is "a mere security for the payment of the rent"; and there is the same ground for relief as in the case of forfeiture by non-payment of a mortgage debt on the day appointed: Story's Equity Jurisprudence, s. 1315, citing *Hill* v. *Barclay*. (1)

The leading case upon the point is *Cage* v. *Russel* (2); and there Lord Nottingham laid down that "it is a standing rule of the Court that a forfeiture should not bind where a thing may be done afterwards, or any compensation made for it—as where the condition was to pay money, or the like."

That rule has been often applied by the Court to the forfeiture of leases by non-payment of rent: *Wadman* v. *Calcraft* (3); *Sanders* v. *Pope* (4); *Davis* v. *West* (5); *Hill* v. *Barclay* (1); *Reynolds* v. *Pitt* (6); *Elliott* v. *Turner*. (7)

It would be a strange thing for the Court to hold that relief could be given to a lessee in all those cases where the lessor has taken proceedings in ejectment and prosecuted them to judgment (see 4 Geo. 2, c. 28, continued by the Common Law

(1) 18 Ves. 56.
(2) 2 Ventr. 352.
(3) 10 Ves. 67.
(4) 12 Ves. 282.
(5) Ibid. 475.
(6) 19 Ves. 134.
(7) 13 Sim. 477.

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Procedure Act, 1852 (15 & 16 Vict. c. 76), ss. 210, et seq.) (1), and yet that no relief could be given in a case where the lessor has (it may be surreptitiously, as the present case) taken peaceable possession without action brought. The Court would surely struggle against any construction of a remedial Act which would lead to such an anomaly as that. In *Grimston* v. *Bruce* (2) relief was given to a devisee of land on a breach of condition, although the heir had entered on that breach without action.

J. G. Wood, for the defendant. This is a case in which the lessor has recovered peaceable possession without the assistance of any court, and accordingly the plaintiff has no right to claim, and the Court has no jurisdiction to grant, relief from the forfeiture. *Grimston* v. *Bruce* (2) was not a case of landlord and tenant.

[STIRLING J. Why should the arm of the Court be shortened by the circumstance that the lessor obtained peaceable possession without the aid of the Court?]

Because equity often interferes to restrain the rigour of proceedings at law, but does not take away rights acquired without recourse to law. The preamble to s. 2 of the Act 4 Geo. 2, c. 28, shews that the legislature only contemplated the existence of the right in cases where the demised property has been recovered by legal process; and the statute limited the right to relief in such cases to a certain time after recovery in ejectment so as to protect landlords. In like manner, the clauses in the Common Law Procedure Act are confined to the cases in which the lessor takes legal proceedings. There is no instance in the books in which the jurisdiction to grant relief has been exercised in a case where the lessor has himself taken peaceable possession, and the Court will not create a precedent. If the Court were to hold that the

(1) Sect. 212 of the Common Law Procedure Act, 1852, provides as follows: "If the tenant or his assignee do or shall, at any time before the trial in such ejectment, pay or tender to the lessor or landlord . . . . or pay into court where the same cause is depending, all the rent and arrears, together with the costs, then and in such case, all further proceedings on the said ejectment shall cease and be discontinued; and if such lessee, his executors, administrators, or assigns, shall, upon such proceedings as aforesaid, be relieved in equity, he and they shall have, hold, and enjoy the demised lands, according to the lease thereof made, without any new lease."

(2) 2 Vern. 594; 1 Salk. 156.

jurisdiction to give relief against forfeiture for non-payment of rent can be applied in cases where peaceable possession has been taken, the whole evil, to remove which the statute was passed, would be left untouched in such cases; and if the jurisdiction existed in such cases the legislature would have dealt with its application to those cases also. Moreover, if there is any right to relief at all it is personal to the lessee, and not assignable; and relief cannot be demanded by a plaintiff who is not the original lessee. And, again, the plaintiff has deprived himself to his title to relief, if any, by refusing to pay anything to the defendant except the costs of a new lease.

Stroud, in reply. The jurisdiction to grant relief in cases of forfeiture for non-payment of money is part of the ancient jurisdiction of the Court, and before the passing of the Act 4 Geo. 2, c. 28, "the tenant might, at an indefinite time after he was ejected, have filed his bill and been relieved against the effect of the mere non-payment of rent": *Bowser* v. *Colby*. (1) The statutes in question here, requiring the lessee to come for relief within six months after execution executed, were passed to remedy this state of things in cases where the lessor has proceeded to judgment and execution in ejectment. Thus an exception was introduced which applies only to cases where proceedings have been taken, and the ancient jurisdiction in cases not within the statute is untouched: *Davis* v. *West*. (2)

Cur. adv. vult.

June 26. STIRLING J., after stating the facts to the effect herein set forth, continued:—

It was admitted on the argument by the learned counsel for the defendant that if on February 21, 1894, the defendant had recovered possession by means of legal proceedings taken against Etheridge, the latter or his trustee in bankruptcy would be entitled to be relieved, both under the general jurisdiction of the Court and under the statute 4 Geo. 2, c. 28. It was, however, strongly urged that no relief could be given where the lessor had recovered peaceable possession without the assistance of any court; and in support of this contention reliance was placed

(1) 1 Hare, 109, 125. (2) 12 Ves. 475.

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(first) on the circumstance that no case can be found in which such relief had been given; and (secondly) on the preamble to the 2nd section of the statute just referred to, which was said to amount to a recognition by the legislature that the right only exists where the demised property has been recovered by legal process.

On behalf of the plaintiff it was suggested that the property was not really in the possession of the defendant at all, and there was some evidence that workmen in the employment of Etheridge had been on the property since possession was said to have been resumed by the defendant. In the view which I take I do not think it necessary for me to decide whether or no the defendant's possession was good legal possession. If it were, I should probably come to the conclusion that it was good, because from the time of his bankruptcy Etheridge ceased to have any legal title: but at all events I so assume.

Are, then, the arguments as to the effect of the peaceable possession well founded? I will first of all consider the grounds on which such relief was formerly given by the Court of Chancery. In *Wadman* v. *Calcraft* (1) Sir William Grant M.R. says: "The plaintiff seeks to be relieved against a forfeiture of this lease; which he states to have been incurred solely by non-payment of rent; and if that is the ground of this ejectment, there is no doubt equity will relieve against the forfeiture; considering the purpose of the clause of re-entry to be only to secure the payment of rent; and that, when the rent is paid, the end is obtained; and therefore the landlord shall not be permitted to take advantage of the forfeiture." In *Sanders* v. *Pope* (2) Lord Erskine says (3): "There is no branch of the jurisdiction of this Court more delicate than that, which goes to restrain the exercise of a legal right. That jurisdiction rests only upon this principle; that one party is taking advantage of a forfeiture; and as a rigid exercise of the legal right would produce a hardship, a great loss and injury on the one hand arising from going to the full extent of the right, while on the other the party may have the full benefit of the contract, as originally framed, the Court will interfere; where a clear mode

(1) 10 Ves. 67, 68. (2) 12 Ves. 282. (3) 12 Ves. 289.

of compensation can be discovered. Of this nature is the case, that constantly occurs, confirmed by statute (stat. 4 Geo. 2, c. 28), giving a more ready mode of relief at law: a contract to pay rent, with a covenant and clause of re-entry for breach. The obvious intention is to secure the payment of the rent; that the landlord may not be put to his action of debt, coming from time to time against an insolvent estate; but may be enabled to recover possession of the premises. In that case equity is in the constant course of relieving the tenant, paying the rent and all expenses . . . . and upon payment of the rent and all expenses will not permit the tenant to be turned out of possession; considering, that in the one case frequently great hardship might be the consequence; in the other, the party being placed in the same situation, there is in general no hardship."

In *Davis* v. *West* (1) Lord Erskine makes these remarks: "Where covenants are broken, and there is no fraud, and the party is capable of giving complete compensation, it is the province of a Court of Equity to interfere, and give the relief against the forfeiture for breach of other covenants, as well as that for payment of rent; and the only distinction is, that in the latter case it is considered so clear, that the object of the clause for re-entry is only to secure the payment of the rent, that the legislature interposed; and made it unnecessary to come into Equity; allowing the tenant upon the terms, and within the time, specified by the Act 4 Geo. 2, c. 28, to stop the ejectment; leaving the ancient jurisdiction of Equity in every other case untouched."

The view there expressed as to other covenants has not been altogether approved; but as regards relief from forfeiture for non-payment of rent, the principle is well established.

In *Bowser* v. *Colby* (2) the question was raised as to the redemption of a lease which had become forfeited; and Sir James Wigram V.-C. there says (3): "It appears from the case of *Taylor* v. *Knight* (4), and from Lord Eldon's observations in *Hill* v. *Barclay* (5), that the Court formerly used to consider

(1) 12 Ves. 476.
(2) 1 Hare, 109.
(3) 1 Hare, 130.
(4) 4 Vin. Abr. Ch. pl. 31, p. 406.
(5) 18 Ves. 59, 60.

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(the lease being gone at law by the re-entry), that the only way it could give relief was by creating a new lease, until the statute, recognising the right of the tenant to be relieved, dispensed with that form of relief, and declared that the last lease should be deemed to have continuance. The analogy to the case of mortgages fortifies the same reasoning. The object of the proviso in both cases is to secure to the landlord the payment of his rent; and the principle of the Court is—whether right or wrong is not the question—that, if the landlord has his rent paid him at any time, it is as beneficial to him as if it were paid upon the prescribed day."

These authorities appear to me to establish that the ground on which Courts of Equity formerly gave relief was that the proviso for re-entry was in the eye of the Court simply a security for the rent; and, on principle, I cannot see that it makes any difference whether the lessor avails himself of such security with or without the assistance of a court of law. It is no doubt remarkable that no reported case appears to have occurred in which relief has been given where the landlord re-entered peaceably and without bringing ejectment; but it is to be remembered that re-entry in this way can be but seldom effected. As to the preamble to s. 2 of the Act 4 Geo. 2, c. 28, it is to be remarked that in terms it appears to contemplate the necessity of an ejectment in every case; but the existence of cases of peaceable re-entry on vacant possession may have been overlooked, or may have been considered of such unfrequent occurrence that they did not amount to a grievance. The statute fixes a period of six months only from recovery in ejectment within which an application for relief may be made, and it is said that the whole evil which the Act was passed to remove would be re-introduced if it were to be held that the jurisdiction to give relief were to be applied in a case where peaceable possession had been taken. Upon that two observations may be made: first, that if the landlord desires to limit the time within which the tenant can apply for relief, he can avail himself of legal process to recover possession and so get the benefit of the statute; and, secondly, that it does not follow that a Court of Equity would now grant relief at any distance of time from the happening of the event which gave rise to it. It

appears to me that, inasmuch as the inconvenience of so doing has been recognised by the legislature, and a time has been fixed after which, in a case of ejectment, no proceedings for relief can be taken, a similar period might well be fixed, by analogy, within which an application for general relief in Equity must be made. A Court of Equity might possibly say that the action for relief must be brought within six months from the resumption of possession by the lessor.

I think, then, that if the lease had remained vested in Etheridge or his trustee in bankruptcy, he or his trustee would have been entitled to relief. It was said, however, that the right was personal to the lessee, and that relief could not be given to his mortgagee. It is unnecessary to consider whether a mortgagee is, by virtue of his mortgage, entitled to be relieved from a forfeiture. It would appear from the case of *Hare* v. *Elmes* (1), that relief would not, as a rule, be given to an underlessee or mortgagee in the absence of the original lessee; but in the present case the mortgagor has become bankrupt, and the mortgagee has obtained from the trustee in bankruptcy an assignment of the equity of redemption in consideration of a payment of 5*l*. Now, by s. 44 of the Bankruptcy Act, 1883, all property of the bankrupt vests in the trustee; and by s. 168 "property" includes things in action. The right of the bankrupt to be relieved of a forfeiture appears to me to be a thing in action, and to have become vested in the trustee in the bankruptcy; and the trustee was entitled to sell the right and assign it to a purchaser: *Seear* v. *Lawson* (2); *Guy* v. *Churchill*. (3) I think, therefore, that the plaintiff is entitled to bring the action.

Lastly, it was contended that the plaintiff had deprived himself of his right to relief by the position which he took up in the interval between February 21 and the bringing of the action, and in particular by the letter of May 4, 1894, in which he declined to pay anything to the defendant except the costs of a new lease. I am unable to take this view of the plaintiff's conduct. I think that the correspondence does not shew a refusal by the plaintiff to pay the arrears of rent, but merely

(1) [1893] 1 Q. B. 604. (2) 15 Ch. D. 426.
(3) 40 Ch. D. 481.

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a refusal to pay certain sums claimed by the defendant's solicitors in a letter of April 25, which the defendant had no right to demand.

In my opinion, therefore, the plaintiff is entitled to the relief for which he asks.

At the conclusion of the judgment,

Stroud suggested that the plaintiff was entitled to relief on the footing of that given in cases of ejectment under s. 212 of the Common Law Procedure Act, 1852, i.e., to hold and enjoy the demised lands according to the old lease thereof, under which his position would be much safer than under a new lease.

STIRLING J. then directed minutes to be prepared.

June 29. The case now came on to be spoken to on the minutes.

Stroud, for the plaintiff. As s. 212 of the Common Law Procedure Act has been held not to be confined in its operation to cases where the lessor has recovered possession by proceedings in ejectment, it is not necessary that a new lease should be granted; and we ask the Court, after declaring that the plaintiff is entitled to relief, to go on to declare that upon payment being made by him of all proper sums he shall be entitled to hold and enjoy the demised lands according to the lease thereof granted in 1892. The position of the plaintiff would be much safer under the original lease than under any new lease which could now be granted. [He referred to *Bowser* v. *Colby*. (1)]

J. G. Wood, for the defendant. Before the Common Law Procedure Act, 1852, the practice of the Court in cases of this kind was to order a new lease to be granted: *Taylor* v. *Knight*. (2) The series of enactments in the Act of 1852, dealing with forfeiture and relief therefrom, from ss. 210 to 217, are all based upon ejectments, which had a writ of ejectment for their initial proceeding, and they have no reference to the general jurisdiction of the Court.

(1) 1 Hare, 109, 125. (2) 4 Vin. Abr. Ch. pl. 31, p. 406.

[STIRLING J. But being a remedial Act, is it not applicable to all lessees coming to the Court for relief?]

The time during which relief must be claimed cannot be ascertained except by reference to process at law, and, even if the broadest construction is to be put upon the section, it must be one to be found within the four corners of the Act. [He also referred to the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126).]

STIRLING J. The point which has been raised is one of some difficulty. I do not think on the whole that s. 212 of the Common Law Procedure Act, 1852, should be read as limited to a case where proceedings in ejectment have been taken. The series of sections begin with s. 210. [His Lordship then read that section, and continued:—] Then s. 211 deals with what is to take place where a lessee comes for relief in Equity, and provides that he is not to have an injunction or relief without payment of rent and costs. It has already been decided by Wigram V.-C. in *Bowser* v. *Colby* (1) that that section does not apply where there has been no application for an injunction. Then s. 212 reverts to proceedings where there has been ejectment, and enacts that if the tenant or his assignee at any time before the trial in such ejectment pay or tender to the lessor, or into the court where the cause is depending, all the rents and arrears together with the costs, then all further proceedings on the said ejectment shall cease and be discontinued, "and if such lessee . . . . shall upon such proceedings as aforesaid be relieved in Equity he . . . . shall have, hold, and enjoy the demised lands, according to the lease thereof made, without any new lease."

The question is whether the words "such lessee" and "such proceedings as aforesaid" relate merely to a lessee and proceedings taken by him when there have been proceedings in ejectment, or whether the section applies to any case where there is an application to a court consequent upon a forfeiture. Now the statute is a remedial one, and should, I think, be read as widely as possible. Probably what the legislature had in

(1) 1 Hare, 109, 125.

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contemplation when the Act was passed was a case where there had been proceedings in ejectment, as that would most frequently occur; but the latter part of the section is not, I think, so expressed as to compel me to hold that all proceedings are excluded where there has been no ejectment. I think, therefore, I may add to my judgment a declaration that the plaintiff shall have, hold, and enjoy the demised property, according to the leases thereof mentioned in the statement of claim, without any new lease, following the words of s. 212 of the Act. He must, of course, pay the rent; and the defendant must thereupon deliver up possession to him. The plaintiff must bear the costs of the action except so far as they have been increased by the defendant resisting his claim, and those costs must be borne by the defendant.

The minutes of the order as settled were as follows (omitting such portions as are immaterial):—

"This Court doth order and adjudge that on payment or satisfaction (by deduction from the plaintiff's costs hereinafter ordered or otherwise) by the plaintiff to the defendant of the sum of 16*l.* 17*s.* 6*d.* (being the aggregate of the rents reserved under the leases of . . . . in the statement of claim mentioned up to and including June 24, 1895) the plaintiff be relieved from the forfeiture of the said leases respectively occasioned by the non-payment of the said rents, and that the plaintiff his executors administrators and assigns is and are entitled to have hold and enjoy the lands messuages and hereditaments, and all easements and appurtenants thereof, demised by the said leases respectively according to the said leases respectively without any new leases or lease."

Solicitors: *H. C. Barker; Flower, Nussey & Fellowes.*

W. W. K.

JOHN HARPER & CO., LIMITED *v.* WRIGHT & BUTLER LAMP MANUFACTURING COMPANY, LIMITED.

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July 2.

[1894 J. 385.]

Design—Registration—Infringement—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57)—*Idea underlying Design not protected by Registration.*

Registration of a design does not protect the idea of the designer, but only the actual design.

The plaintiffs registered a design consisting of a church window of a particular style of architecture with tracery above and below, which they applied in metal work to the sides of upright hexagonal oil stoves. The defendants, adopting the idea of the plaintiffs, produced a design consisting of a church window of a different style of architecture with different tracery above and below, which they also applied in metal work to the sides of upright hexagonal oil stoves :—

Held, that, as the two designs were essentially different, the defendants' design was not an infringement of the plaintiffs'.

THE plaintiffs were the proprietors of a registered design for an oil stove sold by them under the name of the "Cathedral stove." The design consisted of a church window, with tracery above and below, and was applied to the sides of an upright hexagonal frame or case made in electro brass or electro copper, or other metal, and containing an oil lamp for heating purposes. The plaintiffs were also the registered proprietors of a similar design which was in the nature of an improvement on the design last mentioned.

The defendants sold oil stoves of hexagonal shape to which they applied a similar design of a church window, with tracery above and below. The church window in the defendants' stove was of a different character and style of architecture from that of the plaintiffs' stove, and the tracery above and below was different; but the two stoves necessarily bore a resemblance to each other, inasmuch as they were both upright, both hexagonal, and both presented to the eye the representation of a church window as being the most distinguishing feature in their ornamentation.

The plaintiffs brought this action claiming an injunction to

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restrain the defendants from manufacturing, selling, offering for sale, or in any manner dealing with, stoves to which either of the plaintiffs' registered designs, or any part thereof, or any obvious or colourable imitation thereof, had been applied, and from infringing the rights of the plaintiffs in their said designs. They also claimed damages or, at the plaintiffs' option, an account of profits.

It appeared in evidence that the design of the defendants was executed for them by a person who was shewn one of the plaintiffs' stoves, and was instructed to make an original design for a similar article.

Warrington, Q.C., and *J. H. Fisher*, for the plaintiffs. The defendants' design is a "fraudulent or obvious imitation" of the plaintiffs' within the meaning of s. 58 of the Patents, Designs, and Trade Marks Act, 1883. The question must be tested by the eye, and when the plaintiffs' and defendants' stoves are compared, and the points of resemblance are observed, namely, the church window on both with tracery above and below, the upright hexagonal shape, and the shape of the cover with the knob at the top, it is obvious that the distinguishing features of the plaintiffs' design have been appropriated by the defendants, and that the defendants' design is an imitation of the plaintiffs': *Hecla Foundry Co.* v. *Walker, Hunter & Co.* (1) It may not be a copy, but it is an imitation. It is proved that the defendants had the plaintiffs' design before them, and directed their designer to imitate it; and therefore, as was intimated by Cotton L.J. in *Grafton* v. *Watson* (2), the onus is on them to shew that their design is not an infringement of the plaintiffs' under s. 58 of the Act.

Marten, Q.C., and *W. N. Lawson*, for the defendants, were not called upon.

KEKEWICH J. The first and great difficulty in arriving at a conclusion on a question of infringement of design is to know what the design is. I have to say what constitutes this design of the plaintiffs for their "Cathedral" stove, and, without disregarding details on the one hand, or attaching too much im-

(1) 14 App. Cas. 550. (2) 51 L. T. (N.S.) 141.

portance to them on the other, to ascertain whether the essential character of the design has been infringed or not. [His Lordship then dealt with certain matters of detail in the plaintiffs' stove, and, after explaining why they did not affect his decision, proceeded:—]

Then what is the essential part of this design? To my mind, there can be no doubt whatever about it. The essence of the whole thing is a window borrowed from ecclesiastical architecture of a class which is to be found in cathedral churches or ancient halls, or among modern windows modelled on the old architecture. That is the essential part, with the tracery above and below. The idea was one of considerable novelty, and was carried into effect with considerable novelty of design. It is said that the defendants have imitated this design. They certainly have made another article which is extremely like that made by the plaintiffs. But two things may be extremely alike, and yet one may not be an imitation of the other. I was struck with the straightforwardness with which the designer employed by the defendants said that he was instructed by them to make an original design for a similar article. With one of the plaintiffs' stoves before him he endeavoured to make an original design for a similar stove. He knew from those who instructed him that the cathedral stove with the church window and tracery had been a success and attractive to the public eye, and that it was desired to make another stove very similar, also with a church window, also with tracery, and also original. Let me reduce that to a practical test. A man engaged on designs for any class of article makes a design according to a window on one side of Westminster Abbey. Another man sees how captivating that is to the public, and he makes a design of another window on another side of the abbey. There is no difficulty, either at Westminster Abbey or at any other fine old church, in finding windows of a different character. To my mind, there can be no harm in the conduct of the second man. The idea of the first man is taken, but it is not the idea which is registered. (1) The

(1) See *Saunders* v. *Wiel*, [1893] 1 Q. B. 470, judgment of Bowen L.J. at pp. 474, 475, and judgment of Cave J., S. C. 9 Rep. Pat. Cas. 467, at p. 469. See also *Barran* v. *Lomas*, 28 W. R. 973.

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plaintiffs, unfortunately, have lost the benefit of their original idea; but they have lost it through another design which is original except in so far as the idea of it was borrowed from their design. I have had the opportunity of looking at the two stoves, and the more I have looked at them the more I have been convinced that they are different. The tracery above and below is different, and the two windows themselves are essentially different, since they belong to entirely different periods of architecture. The sole question is whether there has been an infringement in the sense of imitation such that the two stoves are really the same in point of design. I am of opinion that they are not, and that there has been no infringement of the plaintiffs' design by the defendants. The action, therefore, fails.

Solicitors: *E. Flux, Leadbitter & Paterson, for Slater & Co., Darlaston; Burton, Yeates & Hart, for Johnson, Barclay, Johnson & Rogers, Birmingham.*

C. C. M. D.

KEKEWICH J. 1895 *July* 17.

BISHOP *v.* SMYRNA AND CASSABA RAILWAY COMPANY (No. 2).

[1894 B. 5821.]

Limited Company—Investment—"Depreciation" or "Appreciation"—Restitution to Revenue—Earnings since Liquidation—Capital and Income.

An investment made by a limited company on capital account having fallen in value, the amount of depreciation was, in the half-yearly accounts, debited to revenue.

When the company afterwards went into liquidation, the investment had risen again in value, and the liquidator in his accounts credited to revenue as "appreciation" the amount which had previously been debited as depreciation:—

Held, that the amount credited by the liquidator to revenue as "appreciation" must be treated as income, and not as capital, it being merely a restitution to profits of what had been previously taken from profits.

Earnings by a limited company since the commencement of its liquidation are capital and not income.

In re Bridgewater Navigation Co. ([1891] 2 Ch. 317) applied.

IN this case, already reported on another point (1), two further questions arose in the liquidation of the defendant company—

(1) Ante, p. 265.

first, whether the sum of 6937*l.* entered in the revenue account of the company prepared by the liquidator for the period ending July 26, 1894, under the heading "Appreciation on investments," represented profits earned by the company, and was therefore applicable to the payment of arrears of dividends upon the ordinary shares, or whether it should be carried to the capital account towards the reduction of the deficit on capital account referred to in the former report; and secondly, whether a sum of 948*l.* 17*s.* entered in such revenue account as net revenue earned by the company for the ten days from July 16, 1894, the date of the commencement of the liquidation, to July 26, 1894, should be treated as income or as capital.

The object of the liquidation proceedings was to carry into effect a sale of the company's undertaking to a syndicate for 1,436,000*l.*

The "appreciation on investments" arose thus. In the early part of 1890 the company purchased a large number of its debentures at a price somewhat above par. These debentures were so purchased as an investment, and were treated as such in the accounts, being entered in the account for the half-year ending June 30, 1890—which was approved at the subsequent half-yearly general meeting of the company—as an asset, under the description of an investment on "capital account." This investment account was continued in the subsequent half-yearly accounts, also approved by the company; but, in consequence of a depreciation in the debentures purchased, their book value was from time to time, commencing in 1891, altered by writing off a portion of the amount of investment as depreciation, and the amount of this depreciation was debited to the revenue account. In December, 1893, the company held 96,400*l.* of these debentures as an investment on capital account, their book value being stated, in the accounts for the half-year ending December 31, 1893—which accounts were adopted at the company's half-yearly meeting in April, 1894—at 89,463*l.*, there thus being a depreciation in value of 6937*l.*

In the balance-sheet prepared by the liquidator for the half-year ending June 30, 1894, the value of the debentures stood at the same amount as before, namely, 89,463*l.*, but in his revenue

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account for the period ending July 26, 1894, he took the debentures at their par value, i.e. 96,400*l.*, and treated the 6937*l.*, the amount of the depreciation on the previous book values, as an "appreciation on investments." This revenue account shewed a balance to the credit of revenue of 22,295*l.* 6*s.* 1*d.*, this balance including the 6937*l.* and also a sum of 948*l.* 17*s.* representing net revenue for the ten days from July 16, 1894, the date of the commencement of the liquidation, to July 26, 1894.

Of the 22,295*l.* 6*s.* 1*d.* a sum of 13,508*l.* 11*s.* 5*d.* was payable to the preference shareholders for arrears of dividend under his Lordship's judgment already reported, leaving an undisposed-of balance of 8786*l.* 14*s.* 8*d.* This sum, which included the 6937*l.* and 948*l.* 17*s.*, the liquidator now proposed to distribute among the ordinary shareholders on account of their dividends, they having received no dividends for several years past. The preference shareholders, however, objected that the 6937*l.* should be treated as capital, the investment in the debentures having been treated by the company throughout their accounts as capital; and that the 948*l.* 17*s.* must also be treated as capital, being earnings since the commencement of the liquidation, and that both sums should therefore go in reduction of the deficit on capital account referred to in the former report of the case.

These questions were submitted for the opinion of the Court upon a motion by the plaintiff, on behalf of himself and all other the preference shareholders, for a declaration that no part of the 6937*l.* or 948*l.* 17*s.* could properly be applied in paying dividends to the ordinary shareholders; and for an injunction to restrain the company and its liquidator from distributing such sums, or any part thereof respectively, in payment of such dividends.

In the course of the argument art. 61 of the company's articles of association was referred to. The article in its original form ran thus: "The approval by a general meeting of the balance-sheet and accounts shall constitute a complete discharge for the board"; but by a resolution passed by the company in 1866 the article was altered into the form given in the former report.

Renshaw, Q.C., and *Stokes*, for the plaintiff. The question is whether these two sums are "net profits" or not. We say they

both represent capital, and should be applied in reducing the deficit on capital account. As to the 6937*l.*, it represents in reality the depreciation of an investment always treated by the company in their accounts as capital. This is an attempt to reopen accounts which have been adopted at the half-yearly meetings, and which must therefore be accepted as conclusive under art. 61. If there has been a gain upon the investments it must be applied in reducing the deficit on capital. In short, profit on capital is "capital," and must make good a loss to capital, and not be carried to revenue.

As to the 948*l.* 17*s.*, that must clearly be treated as capital, for as the company, after liquidation, cannot be treated as a going concern it cannot earn profits.

Warrington, Q.C., and *F. M. S. Cassel*, for the defendant company and the liquidator. As to the 948*l.* 17*s.*, we cannot argue that this should not be treated as capital. But with regard to the 6937*l.*, we say this represents undrawn profits set apart as a reserve fund; and we rely on *In re Bridgewater Navigation Co.* (1), where a reserve fund created by a company, while it was a going concern, out of net revenue was held to represent undrawn profits. Here this sum constituted a reserve fund to meet a depreciation; but that depreciation has not occurred, and therefore the fund should come back into revenue and be treated as undistributed profits. It is not necessary to make up a deficiency in the capital of a company before distributing the earnings: *Lee* v. *Neuchatel Asphalte Co.* (2) There is no authority in the articles of this company to capitalize revenue otherwise divisible as profits. Crediting the 6937*l.* to revenue is only returning to revenue what in previous accounts has been taken out of revenue. If it was right to take the depreciation into account in ascertaining net revenue, it is also right to take the appreciation into account for the same purpose.

Renshaw, Q.C., in reply. *In re Bridgewater Navigation Co.* (1) has no application to this case, for in that case express power was given to the directors of the company by its articles to set aside a reserve fund out of profits; whereas here there was no such power. Then art. 61 enables the majority of the shareholders

(1) [1891] 1 Ch. 156; [1891] 2 Ch. 317. (2) 41 Ch. D. 1.

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to bind the minority as to any matter coming within the ambit of the accounts, and there was no corresponding article in the *Bridgewater Case.* (1)

KEKEWICH J. Mr. Renshaw's objection, founded on the terms of the 61st clause of the articles of association, really goes to the root of the case; and if it is to be allowed as entirely sound, that seems to dispose of the argument on the other side. What he says is this, that the 61st article, as altered, provides that "The approval by a general meeting of the balance-sheet and accounts shall be deemed conclusive as to their accuracy, and they shall not be afterwards reopened"; and that therefore, because in 1891 the company in general meeting approved a half-yearly balance-sheet and accounts which allowed for a depreciation on this investment, no question can ever hereafter be raised whether that investment was worth the sum at which it was written into those accounts, notwithstanding that it may since have either increased or diminished in value. To my mind that is not the meaning of the article. Mr. Renshaw says the adoption by the company of the accounts settles them "once for all." I think the introduction of those words makes a considerable difference, because they import a meaning of the words which is not to be found in the article itself. What I understand the article to mean is this: No one shall ever thereafter question the accuracy of that balance-sheet and those accounts; no one shall ever say (applying the article to the concrete case) that these debentures were not originally worth so much, that by depreciation they had not fallen to so much, and that the division of profits ought not to proceed on the footing of that depreciation. Nobody now says that that balance-sheet and those accounts are otherwise than accurate, or that they should be in the slightest degree interfered with. What is said is that since that date events have happened which have caused an appreciation of the debentures, and that there is no reason why you should not now consider the appreciated value in the same way as before you considered the depreciated value; and even if you introduce those words "once for all," I do not myself see

(1) [1891] 1 Ch. 156; [1891] 2 Ch. 317.

that they prevent any appropriation of the appreciated value at the present time, notwithstanding that the balance-sheet and accounts deal with the depreciation in value. Indeed, I do not myself see any answer to Mr. Cassel's argument, that if it is right, as a matter of account, to bring into account the depreciation, it is also right to bring into account the appreciation.

But perhaps a little confusion has been introduced into this case by this being called an "investment," this having been treated as a purchase of debentures still existing. The truth is that it is an entire mistake to call it an "investment." It is nothing of the kind. Whether it was competent for the company to make this purchase or not is immaterial for the present purpose: I am not concerned to inquire, and do not mean to inquire into that. What they really did was to sink a certain amount of capital, but they chose to treat it in the accounts as if it was a purchase of investments. Then, finding the debentures had fallen in value, they charged this fall in value to "depreciation." Now they have risen in value again, and what had been written off for the purposes of these accounts has now been made good by the increase in value. It has been said that the sum representing this increase in value answers to a reserve fund; but it does not seem to me to be anything like a reserve fund. I am not sure that it is strictly "undrawn profits," but I think it is much more like undrawn profits than a reserve fund, because, if the allowance for depreciation had not been made, of course the profits from time to time divisible would have been so much the larger. But whether that is so or not, what we have now is not the mere increase in value of an item of investment, but the rehabilitation of the value of the investment. It is writing back what was before written off; and I cannot for myself see why, since the amount written off was treated as a deduction from profits in former accounts, the amount that is now written up should not be treated as profits in the same way. It seems to me to be not an accretion of principal, but a restitution of what was before taken away—taken away from profits, and therefore a restitution to profits. It is quite possible that this mode of looking at the amount now written up is no more really accurate than calling it a reserve fund,

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or calling it undrawn profits; but it seems to me it is in accordance with fact and with what was really done: moreover, it is, I think, according to principle, and quite, as I read the case, in accordance with *In re Bridgewater Navigation Co.* (1), which, I agree, is not strictly in point in the sense of being on all-fours with the present case, but yet does lay down a principle which is useful here.

I think, therefore, in accordance with that case, this sum is divisible as profits and not as capital.

Solicitors: *Parker, Garrett & Parker; Bircham & Co.*

(1) [1891] 2 Ch. 317.

G. I. F. C.

C. A.
1895
June 24, 25.

In re SCOTT AND ALVAREZ'S CONTRACT.

[1893 S. 5097.]

SCOTT *v.* ALVAREZ.

[1894. S. 2933.]

Vendor and Purchaser—Conditions of Sale—Condition restricting Objections to Title—Bad Title shewn Aliunde—Return of Deposit refused, but Specific Performance also refused.

A purchaser bought property under a strict condition of sale that he should not make any objection as to the intermediate title between a certain lease and the assignment of it, but should assume that the assignment vested a good title in the assignees.

It was afterwards discovered by the purchaser that there was a vital defect in the intermediate title, and that the assignees had no title to the property:—

Held, (1) (reversing the decision of Kekewich J.), that the purchaser was bound at law by the condition, and therefore could not recover his deposit; but (2.) (affirming the decision of Kekewich J.) (dubitante Lopes L.J.), that as the vendor could not give a holding title to the purchaser, the Court would, in the exercise of its discretion, refuse to decree specific performance of the contract, and would leave the parties to their remedies at law.

APPEAL from a decision of Kekewich J. (1)

The facts and proceedings, which are fully detailed in the report of the case in the Court below, may be stated shortly as follows:—

On November 2, 1893, Miss Robina Scott, the mortgagee of a leasehold house in Rectory Square, Mile End Road, put up the house for sale by auction, the property being described in the particulars as a "small safe investment," and it was stated to be let at a rent of 36*l.* per annum, and to be "held for a term of 99 years from the 25th March, 1865 (70½ years unexpired), at a moderate ground-rent of 5*l.* per annum."

The subject of the sale was, however, not the lease for ninety-nine years granted in 1865, but an underlease granted in 1867 of that term except the last twenty-one days thereof.

(1) [1895] 1 Ch. 596.

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The sale was subject to printed conditions of sale, the most material of which were the following:—

"4. The underlease under which the property is held, and the counterpart of the underlease or agreement with the tenant, or copies thereof, will be produced at the sale, and may be inspected, and the purchaser shall be deemed to have full notice at the time of the sale of the contents thereof."

"6. The purchaser shall be furnished with an abstract of the underlease dated the 25th of June, 1867, and made between Mark Bean of the one part, and Mary Ann King, widow (since deceased), of the other part, under which the property is held, and of an assignment of such underlease dated the 11th of August, 1891, and made between John Burder Batchelor of the one part, and Harry Banks and Sarah Jane Banks, his wife, of the other part, and the subsequent title, and shall not make any objection or requisition in respect of the intermediate title to the premises between the granting of the lease and the execution of the said assignment, notwithstanding any recital of or reference to such title contained in the assignment or any subsequent document of title, but shall assume that the said assignment vested in the assignees a good title for the residue of the said term."

The latter part of the 9th condition was as follows: "The vendor, being a mortgagee selling under a power, shall not be required to enter into any covenant or undertaking, except the usual express or statutory implied covenants that she has not incumbered, and the mortgagors shall not be required to join in any assurances for the purpose."

The property was knocked down at the price of 330*l.* to Henry Alvarez, who duly signed the contract, and paid a deposit of 30*l.*

The abstract delivered to the purchaser commenced with the underlease of June 25, 1867, mentioned in the 6th condition of sale, whereby the property was demised to Mary Ann King, widow, for the term of ninety-nine years from March 25, 1865, except the last twenty-one days thereof, at the yearly rent of 5*l.*, and subject to various lessee's covenants.

The next deed in the abstract was the assignment of August 11,

1891, also mentioned in the 6th condition, by J. B. Batchelor to Harry Banks and Sarah Jane Banks, his wife. By that assignment, after reciting the underlease, and that by divers mesne assurances, acts in the law, and events, and ultimately by virtue of a final order for foreclosure made on August 10, 1891, in an action wherein J. B. Batchelor was plaintiff, and Harry Banks and others defendants, the premises had become vested in J. B. Batchelor for all the residue of the said term (less the last twenty-one days), subject to the said rent and covenants.

The abstract then continued the title to Robina Scott, the vendor, who was a second mortgagee, and who was selling under her power of sale.

The purchaser made various requisitions as to the title, and before the purchase was completed became suspicious of the validity of the assignment of August 11, 1891, in consequence principally of some information given by Mr. Etherington, the solicitor for the vendor. It was stated by that gentleman, on the authority of Sarah Jane Banks, that Mary Ann King, to whom the underlease of June 25, 1867, was granted, died intestate in the month of February, 1873; and that she had, by a written document dated January 1, 1868, given the premises to Sarah Jane Banks absolutely, who, from that time to the date of the order for foreclosure, had been in undisputed possession of the property. He also stated that the mortgage, which was foreclosed in 1891, was signed by Sarah Jane Banks by the name of Mary Ann Banks, and that she represented herself in the mortgage and a statutory declaration which accompanied it as the same person as Mary Ann King, to whom the underlease was granted.

The purchaser, not being satisfied with the title, took out a summons under the Vendor and Purchaser Act, which was heard by Kekewich J., who made an order declaring that the title was not such as the purchaser ought to be compelled to accept, and directing the vendor to return the purchaser his deposit, and to pay the costs of the investigation of the title and of the summons.

This order was reversed on March 2, 1895, by the Court of Appeal, who held that the purchaser had not shewn that he could

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not get a good title, but that, on the contrary, it appeared that he would have a good holding title under the Statute of Limitations, and that he was precluded by the 6th condition of sale from going into the defects in the title between the underlease and the assignment.

An assignment of the premises was accordingly executed by the vendor and other necessary parties and tendered to the purchaser; but he refused to execute it on the ground that since the date of the order of the Court of Appeal on the summons he had discovered that a gross fraud had been committed by Sarah Jane Banks, and that the vendor had no title at all to the property.

The vendor accordingly, on June 23, 1894, brought an action against the purchaser for specific performance of the contract for sale. The defendant applied for and obtained from Kekewich J. an order, intituled in the vendor and purchaser summons and the action, giving him leave to bring an action of review by way of counter-claim in the action, notwithstanding the order of the Court of Appeal on the vendor and purchaser summons, on the ground that since the date of that order he had discovered certain facts set out in the joint affidavit of himself, his solicitor, and J. Wardill, who had married a sister of Sarah Jane Banks.

On December 3 the defendant delivered a defence and counter-claim in the action. He repeated the statements made in the affidavit above referred to, and claimed that, notwithstanding the order of the Court of Appeal, it might be declared that a good title had not been shewn; and that the plaintiff might be ordered to repay the deposit with interest, and the costs of investigating the title.

The facts which had been discovered by the defendant, and which were substantially proved at the trial of the action, were briefly as follows:—

Mary Ann King, who was the mother of Sarah Jane Banks, did not die in 1873 intestate as alleged, but died on January 3, 1871, having by her will dated July 24, 1865, as altered by a codicil dated December 23, 1870, given the residue of her estate comprising the leasehold house in question to her daughter Sarah Jane Banks in trust for her three daughters, Sarah Jane Banks,

Amelia Margery Wardill, and Mary Ann Wolfe, equally during their respective lives, and after their deaths in trust for their children as therein mentioned. And she appointed Sarah Jane Banks her sole executrix.

Sarah Jane Banks proved her mother's will and administered her estate, and received the rents and profits of the leasehold property until the order for foreclosure mentioned above, and until a recent period paid a third part to each of her sisters during their lives, and after their deaths to or for the benefit of their children.

Sarah Jane Banks, as she herself admitted, executed the mortgage mentioned in the foreclosure order under the name of Mary Ann Banks, fraudulently representing herself to be the same person as Mary Ann King, and appropriated the money raised by the mortgage to her own use. She also admitted that the alleged document of gift, bearing date January 1, 1868, was a forgery, and was drawn up and signed by her to induce Mr. Etherington to believe that she had a good possessory title to the property. All these fraudulent acts were done without the knowledge of the beneficiaries, who were entirely ignorant of Sarah Jane Banks's dealings with the property.

Kekewich J. gave judgment to the following effect :—The Court, being satisfied that the further evidence adduced was not known to the defendant at the date of the order of the Court of Appeal, and that he could not have then acquired a knowledge thereof by the use of reasonable diligence, declared that the order of the Court of Appeal was not binding on the defendant, and that the defendant was not bound to accept the title to the leasehold premises in the pleadings mentioned. And he dismissed the plaintiff's action without costs, and ordered the return of the deposit with interest, and payment to the defendant of the costs of the investigation of the plaintiff's title, and ordered the plaintiff to pay the costs of the counter-claim. From this judgment the plaintiff appealed.

Farwell, *Q.C.*, and *Duka*, for the appellant. Condition 6 provides that the purchaser is not to make any objection or requisition in respect of the intermediate title between the

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granting of the underlease of June 25, 1867, and the assignment of it on August 11, 1891, and is to assume that the assignment vested in the assignees a good title for the residue of the term. He now contends that he can make such an objection, and that he is not bound to assume any such thing; but the condition must be construed with regard to the broad and natural meaning of the language employed in it, and he is absolutely precluded from every species of objection in relation to the intermediate title, and must assume for all purposes that the assignment vested a good title in the assignees for the residue of the term whether it did so or not. If the purchaser brought an action at law to recover his deposit he would certainly fail: *Corrall* v. *Cattell* (1); and he would be held to be precluded from taking the objection or rescinding his contract: *Cattell* v. *Corrall* (2); *Duke* v. *Barnett.* (3) There being no breach of contract on the part of the vendor, he is entitled to specific performance: *Hume* v. *Bentley* (4); *Best* v. *Hamand.* (5) The word "notwithstanding" directs the attention of the purchaser to the matter, for its fair meaning is—"I wish to tell you that there is a recital or reference which raises an objection."

[Lopes L.J. Does not the word rather mean "although there may be" or "although there is"?]

That would do as well. There is enough to shew a bargain that the intermediate title, though bad, should be accepted without objection: *Waddell* v. *Wolfe* (6); *In re National Provincial Bank of England and Marsh.* (7) It is perfectly competent for adult persons, with their eyes open and on an equality with one another, to make a bargain of this kind with one another, or to enter into any contract they like. In order to succeed, the purchaser must shew some personal equity against the vendor. Instead of this, he himself commits a breach of contract, and comes to the Court saying, "Although I have broken my contract I will compel you to repay my deposit." No case has ever gone to that length. There is no difference upon this point between law and equity.

(1) 4 M. & W. 734.
(2) 3 Y. & C. Ex. 413.
(3) 2 Coll. 337.
(4) 5 De G. & Sm. 520.
(5) 12 Ch. D. 1.
(6) L. R. 9 Q. B. 515, 519.
(7) [1895] 1 Ch. 190.

The purchaser bought the chance, and he must abide by his bargain: *Jones* v. *Clifford.* (1)

Renshaw, Q.C., Byrne, Q.C., and *Ingpen,* for the respondent. The parties are not bound by the previous decision of the Court of Appeal now that the new facts have been disclosed. It is now not seriously contended that the vendor can make a good title to the property. The evidence is clear that a gross fraud has been perpetrated, and that the house is trust property. The vendor, therefore, cannot rely upon *Bailey* v. *Barnes.* (2) It is impossible to contend that upwards of twenty years after the death of the testatrix her executrix can convey the property without any reference to the conveyance being made by her in that capacity. We contend that even at law, having regard to the Judicature Act, the defendant would be able to recover his deposit in a case like this; but whether he can or not, the Court will not grant specific performance where the title is clearly bad. The Court has a discretion in such cases, and the Court has never forced a title on a purchaser when he might be ejected from the property the next day: *Pegler* v. *White.* (3)

[Lopes L.J. referred to *Harnett* v. *Baker.* (4)]

Farwell, Q.C., in reply.

Lindley L.J. This is an appeal by a plaintiff in an action for specific performance against an order made by Kekewich J., which dismisses the action without costs, and also goes on to direct the plaintiff to repay to the purchaser a deposit of 30*l.* with interest, and certain costs of and incidental to the investigation of the plaintiff's title.

The question arises under a very unfortunate litigation. It appears that a small leasehold property was put up for sale and was described in attractive form as "A small safe investment arising from a certain dwelling-house," and so on, "held for a term of 99 years from the 25th of March, 1865 (70½ years unexpired), at a moderate ground-rent of £5 per annum"; and the unfortunate defendant has bought this for a sum of over 300*l.*, and, instead of finding he has bought "a small safe investment,"

(1) 3 Ch. D. 779.
(2) [1894] 1 Ch. 25, 37.
(3) 33 Beav. 403.
(4) L. R. 20 Eq. 50.

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he is embarked in two lawsuits and two appeals, and is threatened with more.

Now, upon the question which we have to decide some of the conditions of sale are important. [His Lordship read the 4th and 6th conditions of sale, and continued:—] The property sold is an underlease, and there is no attempt to describe it as a lease. It is to be observed that there is something like twenty-four years between the date of the underlease after June 25, 1867, and the assignment of August 11, 1891; and with respect to that interval of twenty-four years the 6th condition says that the purchaser shall not make any objection or requisition in respect of the intermediate title, and shall assume that the said assignment vested in the assignees a good title for the residue of the said term. I pass on to the 9th condition, the last part of which is important, that is to say, that "the vendor, being a mortgagee selling under a power, shall not be required to enter into any covenant or undertaking, except the usual express or statutory implied covenant that she has not incumbered, and the mortgagors shall not be required to join in any assurance for any purpose."

Now, it appears that the purchaser took objections to this title—objections applying to the dealings with this property between June 25, 1867, and August 11, 1891, and in consequence of what the purchaser discovered he refused to complete the purchase. Then a summons was taken out under the Vendor and Purchaser Act in order to have the objections adjudicated upon, and that came first before Kekewich J., and afterwards before the Court of Appeal. (1) It appeared at that time to the Court of Appeal that the purchaser could not establish that the title was a bad one. So far as appeared from the materials before the Court at that stage, the Court came to the conclusion that although there were objections to the title so serious that a title could not be forced on the purchaser but for this condition, yet that, having regard to this condition, a good title was made. The Court was very careful to point out that which I have just referred to—that it did not appear that the title was a bad one. On the contrary, the Court came to the conclusion that the title

(1) [1895] 1 Ch. 596.

appeared to be what is called a good holding title. One would have hoped that there would have been an end of it; but the purchaser appears after that to have found out something more; and now unquestionably the purchaser has established that the title is positively bad. I do not think it necessary to go into the details of the title. There have been a fraudulent concealment of a will and a gross breach of trust which have come to light, and consequently it is apparent that the vendor cannot make a title. Under those circumstances the vendor still seeks to rely on the 6th condition, and to compel the purchaser to complete. He has brought an action for specific performance, which it is a pity was not done before; and the purchaser, notwithstanding the decision of the Court of Appeal, obtained leave to re-open the whole case, and he has availed himself of that permission; and he contends that, notwithstanding the decision of the Court, these facts, which are new and could not have been discovered with reasonable diligence when the case was before the Court before, entitle him to resist the application for specific performance; and he also by his counter-claim asks to have his deposit returned. We have to decide what is the real legal consequence of this new discovery. Kekewich J. has held that the new discovery is so important that the plaintiff is not entitled to a decree for specific performance, and as a result is not entitled to retain the deposit, and he has ordered the deposit to be returned. From that judgment the vendor appeals.

The first question we have to consider is, what is the true construction of the 6th condition which I have read. Is it to receive a narrow construction, or is it to receive that construction which Mr. Farwell says is the natural one, having regard to the language in which it is couched? Kekewich J. has construed it rather narrowly. He leans to the view that the condition, "the purchaser shall not make any objection or requisition in respect of the intermediate title to the premises between the granting of the lease and the execution of the said assignment," is rather controlled and cut down by what follows: "notwithstanding any recital of or reference to such title contained in the assignment or any subsequent document of title, but shall assume that the said assignment vested in the assignees a good title for the

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residue of the said term." I confess my own impression is that the learned judge has put rather too narrow a construction on that condition. I should read it in this way—that, "notwithstanding the recital of or reference to such title, although we tell you there are difficulties, you are not to make any objection in respect of the intermediate title between June 26, 1867, and August 11, 1891; but you are to assume for all purposes that that assignment vested in the assignees a good title." I think that is the true view of that condition.

Now, if that is the true view of the condition, the first question is whether, under those circumstances, an action at law could be maintained by the purchaser to get back his deposit. There is no question of discretion in such a case as that; and I dissent entirely from the proposition contended for by Mr. Byrne, that since the Vendor and Purchaser Act, or since the Judicature Act, there is any difference now between the law on that point and the law before. We know perfectly well that when two persons enter into contracts there are two remedies open. One is an action at law for damages, and the other is the extraordinary remedy of a suit for specific performance. I am now addressing myself to the legal aspect of the case; and, bearing that in mind, if once we construe the 6th condition in the sense in which I construe it, it appears to me the purchaser would fail if he brought an action at law to recover his deposit; and I must say I think the case Mr. Farwell has referred to of *Corrall* v. *Cattell* (1) is decisive on that point. The legal answer is this: "There is no breach of contract at all; you have taken your chance with respect to your deposit; and unless you shew a breach by the vendor of his bargain, you are not entitled to have that deposit back." That is the answer to the action at law. Therefore it appears to me that the appeal must succeed so far as the counter-claim is concerned.

But, when we come to the remedy by specific performance, we get into an entirely different region of law. The extraordinary remedy by specific performance is always more or less open to discretion; and I am not aware of any case in which, unless the condition has been extremely clear, a Court of Equity has ever

(1) 4 M. & W. 734.

forced a purchaser to take a title which is shewn to be bad, and which will expose the purchaser to an immediate lawsuit, against which he will have no defence. That is what we are asked to do under the stringency of this condition. Mr. Farwell referred us to several cases, and among them to *Hume* v. *Bentley* (1), *Duke* v. *Barnett* (2), and *Cattell* v. *Corrall* (3); but, on looking at them, I am not satisfied that in any one the Court thought the title which it did force the purchaser to take would be a bad title in the sense in which this title is bad. When you say a title is bad, the expression is ambiguous, and must be contrasted with what is called a good title. I understand a good title to be one which an unwilling purchaser can be compelled to take. Contrasted with that, any title which an unwilling purchaser cannot be forced to take is a bad one. But there are bad titles and bad titles; bad titles which are good holding titles, although they may be open to objections which are not serious, are bad titles in a conveyancer's point of view, but good in a business man's point of view; and I do not know of any case in which a Court of Equity has decreed specific performance of and compelled the purchaser to pay his money for nothing at all when he shews the Court that the title he is asked to have forced on him is bad in that sense, that he can be turned out of possession to-morrow. I do not say that a condition might not be so clear and explicit as to remove the difficulty; but I am not aware of any case of the kind; and, so far as those cases referred to by Mr. Farwell are concerned, I am convinced they are cases in which the title was bad in a technical conveyancing point of view, but not in a business point of view, and did not expose the purchaser to immediate eviction, as it does here. When, therefore, we are asked to decree specific performance of this contract, we are asked to do that which the Court does not do as a matter of course, but the Court considers whether it is just to adopt such a course. In a case like this, it appears to me the true rule is to leave the parties to their legal remedies. If they have a contract, let their legal rights prevail. There are remedies open which we are all familiar with; but the vendor must not

(1) 5 De G. & Sm. 520. (2) 2 Coll. 337.
(3) 3 Y. & C. Ex. 413.

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come and invoke the extraordinary jurisdiction of a court of equity to do what would be a manifest injustice.

It therefore appears to me that Kekewich J.'s view was right, so far as he refused to grant specific performance, but wrong as to the return of the deposit. I confess such a result is not satisfactory. It arises from the double jurisdiction in Courts of Law and Equity, and the extraordinary jurisdiction which is exercised by Courts of Equity. The result is that the part of the order must be reversed which relates to the counter-claim; the defendant succeeds in part of his appeal and fails in part; and there will be no costs of the appeal.

Lopes L.J. This is a suit for specific performance; and I need not say that, having been brought up in the Courts of Common Law, I approach it with respectful diffidence, and I shall not venture to differ from the judgment that has already been delivered by Lindley L.J. and the judgment which I know will be presently delivered by Rigby L.J. But I should like to say this—that it does seem strange to me, that while we hold there has been no breach of contract by the vendor, and the purchaser therefore cannot recover his deposit, yet at the same time we hold that the vendor is not entitled to have that contract specifically performed, but must have recourse to his remedy at law. It is said that specific performance is discretionary, and that a Court of Equity will not decree it where the title is obviously a bad title, as distinguished from a doubtful or holding title. No doubt there is authority for that proposition. I bow to that authority, and to the better judgment of my learned brothers, though it does seem to me to be most anomalous and unfortunate. I venture to think that there might be a condition so framed as to preclude a purchaser from objecting to an obviously bad title, and specific performance of the contract granted; and I would add that in the present case, if I had been left to my own unaided judgment, I should have thought the 6th condition was sufficiently stringent to cover even a bad title—an intermediate bad title I mean—between the terms so specifically and carefully mentioned in that condition.

Rigby L.J. In this case, after consideration of the conditions of sale, especially clause 6, I am unable to say there is not a contract binding at law, and as to the construction of which Courts of Equity must take the same view of course that a Court of Law would take. I think that is enough to shew that in this case there can be no recovery of the deposit which has been paid under the legal contract.

But when we come to the question of specific performance, I think it is a question which cannot be decided by any such process as saying that if there is a contract good in law a Court of Equity ought to apply its own remedy. From the very first, when specific performance was introduced it has been treated as a question of discretion whether it is better to interfere and give a remedy which the common law knows nothing at all about, or to leave the parties to their rights in a Court of Law. Now, the foundation of the doctrine of specific performance was this, that land has quite a character of its own, that the real meaning between the parties to a contract for sale of land was not that there should be a contract with legal remedies only, and that the purchaser should get the land, and should not be put off in an ordinary case by offering him damages. That is the main part of the doctrine of specific performance—that the purchaser is actually to get the land; and, if a case arises in which he cannot get the land in any substantial sense, it seems to me the doctrine of specific performance is not applicable. After all, the question to what extent a Court of Equity will go is very largely one of authority as to what has been done before; and if I found there were cases in which, although the purchaser was not to get the land which he offered to buy, or something which is a mere semblance of a title was forced on him, I should have to consider those cases very carefully and see whether we are bound by them or not. But, so far as the authorities that have been cited to us are concerned, I do not think a single case has been cited in which a purchaser was bound to take a mere semblance of a title, or in which he did not practically get the land with such a title as the judge directing specific performance looked upon as a holding title—as a title in all probability, at any rate, which he

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could set up so as to enable him to retain the possession actually given him. In the case of *Hume* v. *Bentley* (1), the learned judge says distinctly (2) that the objections raised to the title were such as did not interfere with the safety of the purchaser. That that was the foundation for his decree for specific performance I think pretty plain; and, without attempting to go through the other cases, I may say that I have not found a single one in which a Court of Equity has ever been so far led astray from the original doctrine as to say that in cases where the real intention was that the purchaser should get the land he should be treated as though he were going to get the land, though it was plain that he was not. In the present case it is unquestionably plain upon the evidence as it now stands that Sarah Jane King, afterwards Sarah Jane Banks, could not make a title to this property, and that it would be a mere delusion to say to the purchaser, "You have got what you bargained for." He will not get it, that is certain, and he will not get, as far as I can see, a single sixpence in value out of it. Mrs. Banks would be entitled to a third; but she has mortgaged the whole for her own purposes, and her one-third would have to be subject to the whole of the mortgages in addition to the costs, which would plainly swallow up the whole of her one-third. The Court is asked to go through what would be the idle form of making over to the purchaser property in which he will not take the slightest beneficial interest, but which, if he were imprudent enough to accept it, would involve him in litigation quite beyond any value he can possibly get. I do not think the original idea of specific performance covered such a case as this; and I am not aware of any authority in which the Court, knowing that it cannot give the subject-matter of the contract in any substantial sense to the purchaser, has yet said "we will give it when we know we cannot give it." I think it is quite enough that the parties should be left in such a case to their remedies at law; and I am persuaded that the judges who have recently gone into the question of specific performance have taken a similar view, and that there has been no alteration in this respect.

(1) 5 De G. & Sm. 520. (2) 5 De G. & Sm. 527.

LINDLEY L.J. The learned judge in the Court below dismissed the action for specific performance without costs; and we think that this counter-claim should in like manner be dismissed without costs.

Solicitors: *C. Etherington; Rodgers & Co.*

M. W.

SELIGMAN *v.* PRINCE & CO.

[1894 S. 473.]

Company—Debentures—Power to issue in satisfaction of Debts of Founder of the Company—One Man Company.

The directors of a company had power under their articles to borrow or raise money by the issue of debentures. The company was formed to take over the business of P., and was bound by an agreement to indemnify him against the debts and liabilities shewn in a balance-sheet mentioned in the agreement, among which was a debt due to the plaintiff. P. was managing director of the company, and he and his brother were sole acting directors. They issued debentures to the plaintiff and other creditors of P., which they accepted in satisfaction of their debts. Shortly afterwards the company was ordered to be wound up. The plaintiff brought an action on behalf of himself and other debenture-holders for a receiver:—

Held (reversing the decision of Vaughan Williams J.), (1.) that although the debentures were not issued literally for the purpose of borrowing or raising money for the company, their issue to pay debts of P. for which the company was ultimately liable was within the powers of the directors; (2.) that there was no conflict of interest between P. and the company in its corporate capacity, and that the debentures were therefore in fact issued for the benefit of the company and were valid:

Held, also (affirming the decision of Vaughan Williams J.), that the issue of the debentures was not a fraudulent preference of some of the creditors of the company.

APPEAL from a judgment of Vaughan Williams J.

The material facts, as stated in the judgment of Lindley L.J., were as follows:—

In 1892 Llewellyn Prince commenced to carry on business as a tailor in the West End of London. In August of the same year he borrowed 600*l.* from Oscar Seligman, the brother of the plaintiff L. Seligman, upon terms contained in a deed dated August 24, 1892. By this deed Prince mortgaged his business

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premises, book debts and goodwill to Oscar Seligman as a security for 600*l.*, and covenanted to pay that sum within three months after notice in writing requiring payment thereof; but payment was not to be required for eighteen months, and Prince was not to be entitled to pay off the loan for twenty years. Prince then covenanted to carry on the business, to keep and furnish proper accounts, and to pay Oscar Seligman three-sevenths of the net profits in lieu of interest; the effect of the arrangement being that Prince could no longer dispose of his business, or of the property comprised in the mortgage, without the consent of Oscar Seligman.

In July, 1893, Prince applied to the plaintiff for a loan of 150*l.*, and the plaintiff lent him this sum, without security, but upon a verbal understanding that the loan should be repaid as soon as sufficient money could be got by Prince from his customers. On September 26, 1893, the plaintiff issued a writ to obtain repayment of his loan, and he was in a position to sign judgment against Prince for the amount.

At this time Prince determined to form a company to take over his business. A balance-sheet shewing the state of the business on September 30, 1893, was prepared. According to this balance-sheet there appeared to be an excess of assets over liabilities; but only 150*l.* was allowed for bad debts off the sum of 2339*l.* due from customers, which was the main asset of the business. The evidence shewed that the bad debts ought to have been put down at a much larger figure, the business being in fact in an insolvent condition.

On November 17, 1893, an agreement was signed between Llewellyn Prince and Oscar Seligman for the formation of a company to take over the business. Prince was to form the company, and Oscar Seligman was to release his security. Prince was to accept and give him a bill at three months for 1100*l.*, and at the maturity of the bill Oscar Seligman was to accept first mortgage debentures of the company for 925*l.*, bearing interest at 7 per cent., in satisfaction of the bill. These debentures were to be part of an aggregate of like debentures for 1300*l.* It was part of this agreement that Prince should be the managing director of the company, and should vote for the issue of these

debentures to Oscar Seligman, who was to have power to nominate a director so long as his debentures were unpaid, and there were to be only two directors of the company. The plaintiff was not a party to this agreement; but the evidence shewed that he knew that an attempt was to be made to form a company, and that he was willing to take its debentures in satisfaction of Prince's debt to him.

On November 18, 1893, the company was registered. The memorandum of association contained, among others, the following clauses, defining the objects for which the company was incorporated:—(A.) "To purchase or otherwise acquire as a going concern the business of a tailor and outfitter now carried on by Llewellyn Prince, under the name and style of Prince & Co., in London, and all or any of the assets or liabilities of the said Llewellyn Prince in relation to the said business, and with a view thereto to enter into and carry into effect, with or without modification, the agreement, a draft of which has been initialled by two of the subscribers hereto for identification." (I.) "To sell, exchange, mortgage (with or without a power of sale), assign, lease, sublet, and generally otherwise deal with the whole or any part of the business, estates, property, or undertaking of the company as a going concern or otherwise, to any person or persons, association or associations, or otherwise, for such consideration as the company may think fit, and either for cash or for shares, debentures, or securities of any other company having objects included in the objects of this company, and to hold and distribute among the members in specie the whole or part of the consideration for such sale." (K.) "To borrow or raise money on any terms or conditions, by the issue of, or upon, bonds, debentures, debenture stock, perpetual or otherwise, certificates, bills of exchange, promissory notes, or other obligations or securities of the company, or by mortgage, charge, hypothecation, or pledge of all or any of the company's property (both present and future), including its uncalled capital, or in such other manner as the company may think fit."

The articles of association of the company provided that: "The regulations contained in Table A of the first schedule to the Companies Act, 1862, shall apply to this company, and that,

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subject as hereby modified, such regulations shall be the regulations of the company." Table A contains the following clauses: (52.) "The number of the directors, and the names of the first directors, shall be determined by the subscribers of the memorandum of association." (53.) "Until directors are appointed the subscribers of the memorandum of association shall be deemed to be directors." (55.) "The business of the company shall be managed by the directors, who may pay all expenses incurred in getting up and registering the company, and may exercise all such powers of the company as are not by the foregoing Act, or by these articles, required to be exercised by the company in general meeting, subject nevertheless to any regulations of these articles, to the provisions of the foregoing Act, and to such regulations, being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting; but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if such regulation had not been made." The special articles contained, among others, the following clauses: (3.) "The directors shall forthwith enter into, on behalf of the company, an agreement with Llewellyn Prince, in the terms of the draft which, for the purpose of identification, has been initialled by two of the subscribers to the memorandum of association, and the board shall carry the same into effect, subject to any modification thereof which the board may approve." (7.) "The qualification of a director shall be the holding in his own right of 100 shares, and this qualification shall apply as well to first directors as to all future directors; but the first directors shall be allowed a period of three months in which to obtain their qualification shares." (8.) "The first directors shall continue in office till the first ordinary general meeting of the company in the year 1894, and one of the first directors shall be Llewellyn Prince, who shall be managing director." (10.) "No director shall vote on any question in which he has a personal interest apart from the members at large." (13.) "One director shall be a quorum for a board meeting. The seal of the company shall be affixed in the presence of and countersigned by one director and the secretary." (16.) "The directors shall

have power to borrow or raise money by the issue of debentures or otherwise, as they shall think proper, and on the issue of any new shares the same shall, in the first instance, be offered to the members of the company for the time being, in proportion to their respective holdings."

The memorandum was signed by seven persons for one share each. Llewellyn Prince and a brother of his, J. R. Prince, were two of the subscribers. The other persons were clerks or servants in the business. On the same day a three months' bill, falling due on February 21, 1894, for 1100*l.* was given by Prince to Oscar Seligman. On November 28, 1893, a meeting of two directors, namely, the two Princes, and the secretary and solicitor of the company, was held, and it was resolved that the seal of the company should be affixed to the contract referred to in the memorandum of association. On the same day the agreement was sealed accordingly.

This agreement was between Llewellyn Prince and the company, and by it the company agreed to buy his business, and business premises and assets, for 3600*l.*, to be paid by 720 fully paid-up shares of 5*l.* each. Prince was to be managing director. The company was to indemnify him from his debts and liabilities shewn in the balance-sheet already referred to. No mention was made in this agreement of either of the Seligmans, nor was there any mention of debentures.

This agreement was duly filed at the proper office; and on December 4, 1893, another meeting was held of the two Princes as directors, the secretary, and the solicitor of the company. Oscar Seligman and a Mr. Warner were also present. Mr. Warner was then a solicitor's clerk and acted for Oscar Seligman, and also for the plaintiff. At this meeting the 720 fully paid-up shares, being the price of the business, were issued, namely, 500 to Llewellyn Prince, 120 to Oscar Seligman, and 100 to J. R. Prince. It was stated at that meeting that the plaintiff L. Seligman was in a position to sign judgment for a debt of 150*l.* taken over by the company, but that he had offered to accept in discharge of that debt and interest 7 per cent. first mortgage debentures of the company (provided that the issue did not exceed 1300*l.*) to the nominal value of 175*l.* It was also stated

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that Llewellyn Prince had borrowed for the purpose of the business, since September 30, 1893, 125*l.* from Warner on condition that Warner would accept debentures similar to those issued to the plaintiff for 200*l.* L. Prince further stated that the whole of the money borrowed had been used for the purposes of the business, and that the company had the option to repay cash or issue the debentures. It was resolved to elect to issue debentures. It was further resolved that a debenture issue of 1300*l.* in fifty-two debentures of 25*l.* each be created in accordance with the powers contained in the memorandum and articles of association, carrying 7 per cent. interest, and to be made payable as the directors should determine from time to time. It was also resolved to issue seven debentures to the plaintiff, and eight to Warner. There was no allusion in these minutes to the payment of Oscar Seligman, whose bill for 1100*l.* was not due.

Pursuant to the above resolution, debentures for 175*l.* were issued to the plaintiff, and debentures for 200*l.* to Warner. They were in the ordinary form, but made payable if an order was made, or resolution passed, to wind up the company. On January 4, 1894, the bill for 1100*l.* held by Oscar Seligman still not having become due, debentures for 925*l.* were issued to him, and the bill was given up.

On January 31, 1894, a petition was presented to wind up the company. On February 1, 1894, the plaintiff commenced the present action against the company on behalf of himself and the other debenture-holders. On the 5th of the same month a receiver and manager was appointed in that action. On the 6th the company resolved to wind up voluntarily. On the 14th an order was made for winding-up by the Court. The defences raised by the pleadings in the action were substantially as follows: (1.) That no consideration was given for the debentures, and that the directors of the company had no power to issue them; (2.) that, if they had such power, it was improperly and irregularly exercised, and that the debentures were invalid on that ground; (3.) that the company was being wound up and was insolvent, and that the issue of the debentures was a fraudulent preference. Vaughan Williams J., by whom the action was

tried, held that there was no fraudulent preference; but he refused relief to the plaintiff on the other grounds relied upon by the company.

From this judgment the plaintiff appealed.

Grosvenor Woods, Q.C. and *Whinney*, for the appellant. Vaughan Williams J. decided against us on two grounds: first, that the directors had power to issue debentures only to secure money borrowed, and that here no money was borrowed. Secondly, that Prince had agreed with his creditors that if they would forbear pressing him they should have debentures, and that these debentures were issued by him as director in pursuance of that arrangement, and so for his own personal benefit, and not for the benefit of the company. As to the first point, it is true that the debentures were not issued to secure money borrowed; but the transaction in substance came to borrowing. The company was under an obligation to Prince to pay his creditors. If they had issued debentures to other persons, and paid the money so raised to the creditors, the validity of the transaction would have been indisputable. Instead of doing so, they gave debentures to the creditors. In dealing with a borrowing power the substance, not the form, of what is done is to be looked to. Thus, in *In re Inns of Court Hotel Co.* (1), debentures issued in discharge of debts were held to be well issued under a general power of borrowing; and the same rule is laid down in *Howard* v. *Patent Ivory Manufacturing Co.* (2) In the case of *In re Anglo-Danubian Steam Navigation and Colliery Co.* (3) a similar view was taken by Sir G. Jessel under a power to borrow or raise. [*Davies* v. *R. Bolton & Co.* (4) was also referred to.] As to the second point, there was no conflict of interest between Prince and the company; and though the issue of the debentures may have been for his benefit, it was also for the benefit of the company, and was made in furtherance of the objects for which the company was formed.

Farwell, Q.C., and *Ribton*, for the defendant company. The judge took the view taken in *In re George Newman & Co.* (5), and

(1) L. R. 6 Eq. 82.
(2) 38 Ch. D. 156, 170.
(3) L. R. 20 Eq. 339, 341.
(4) [1894] 3 Ch. 678.
(5) [1895] 1 Ch. 674.

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considered that the directors being bound to vote in a particular way, exercised their power improperly, and that there was no sanction by the company of what they had done. This transaction was not a borrowing of money within the meaning of the articles: *In re Pyle Works.* (1) The evidence shews that the directors in issuing the debentures were acting as individuals, and not as directors of the company. The debentures were not issued for the benefit of the company, but of Prince individually. It was a scheme to give preference to his creditors.

Grosvenor Woods, Q.C., in reply.

Cur. adv. vult.

June 26. LINDLEY L.J. delivered a written judgment, in which he stated the facts set forth above, and proceeded as follows:—Such being the facts, it is necessary to consider the legal position of the plaintiff. He is the holder of debentures issued by the directors of the company under the seal of the company, and which have become payable by the company according to their terms. Unless, therefore, they can be successfully impeached, the plaintiff is entitled to judgment. It is said, first of all, that the directors had no power to issue debentures, except for the purpose of raising and borrowing money (see art. 16), and that the debentures issued to the plaintiff were not issued for any such purpose. Literally this is true; but to hold the debentures invalid on this ground would be to sacrifice substance to form. It is true that the plaintiff was not a creditor of the company, but he was a creditor of Prince's, and the company was bound to indemnify Prince against his debt to the plaintiff. If the company had borrowed money from the plaintiff or any one else on debentures, and with the money so raised had paid off the debt owing to the plaintiff by Prince, the debentures would have been perfectly valid, and have been within the very terms of art. 16. What was done was in substance, though not in form, the same thing; and the decisions of Giffard V.-C. in *In re Inns of Court Hotel Co.* (2) and of the present Lord Justice Kay in *Howard* v. *Patent Ivory Manufacturing Co.* (3) support this view of the case, and shew that these debentures are not

(1) [1891] 1 Ch. 173. (2) L. R. 6 Eq. 82.
(3) 38 Ch. D. 156, 170.

invalid on the ground that no money was actually borrowed or raised upon them. But, even if this point were more open to doubt than it is, all doubt is removed by clause I. of the company's memorandum and art. 55 of Table A to the Companies Act, 1862. Although clause I. is not one of those matters required by statute to be in the memorandum of association, and such a clause derives no greater efficacy by being put into the memorandum rather than into the articles of association, still, it is as valid as if it were one of such articles, and it cannot be said that the issue of debentures to the plaintiff was without consideration. If the plaintiff had refused to accept debentures, Prince would have required the company to pay the plaintiff in cash, and the consideration moving from the plaintiff to the company was relief from this necessity. Next, it is contended that these debentures were issued by Prince improperly, and acting as an individual in his own interest, and not bonâ fide in the interest of the company, and that the plaintiff knew this to be the case. It is, however, impossible to ignore the existence of the company as a corporate body distinct from Prince, and impossible to ignore the company's memorandum and articles of association. According to them the issue of debentures was left to the directors, and by art. 13 one was a quorum, and one could authorize the company's seal to be affixed. Further, the company was formed for the express purpose of taking over Prince's business on the terms of paying his business debts. It is plain that these debentures were issued in order to carry out this object, and in order to bind the company on the one hand and to relieve it from pressure on the other; and, although no doubt Prince was acting in his own interest in this matter, his interest and the interest of the company as a body corporate and existing for the purposes mentioned in the memorandum were not conflicting interests, but were similar in all respects. Nor does the fact that the draft of the resolutions of December 4, 1893, was prepared by Warner in the interests of the two Seligmans in any way prove the contrary. By adopting the resolutions he had prepared Prince and his brother were not betraying the company or abusing the powers conferred upon them. They were exercising those powers for the purposes for which they

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were created. I cannot therefore come to the conclusion that the debentures issued to the plaintiff are invalid as against the company upon the ground that the power to issue them was not so exercised as to bind the company.

With respect to fraudulent preference, the view taken by the learned judge was quite correct. Prince is not a bankrupt, and the Bankruptcy Act and the doctrine of fraudulent preference cannot be applied in favour of his unpreferred creditors as such. The company having been ordered to be wound up so soon after the debentures were issued is, by s. 164 of the Companies Act, 1862, to be treated as a bankrupt person; but when these debentures were issued to the plaintiff, the company's only creditor was Prince; and if a man has only one creditor and pays him, such payment cannot be set aside as a fraudulent preference simply because other debts are afterwards contracted. Besides which, no fraud on creditors was really contemplated by any one, and the pressure put by Prince on the company to give debentures to the plaintiff would be enough to enable the plaintiff to have them treated as valid, even if the company had had other creditors than Prince when the debentures were issued.

For the reasons above stated I have come to the conclusion that the appeal must be allowed and the judgment be reversed, and the usual judgment in a debenture-holder's action be substituted for it, and the plaintiff is entitled to the costs of the appeal. This decision in no way conflicts with the decisions of this Court in *In re George Newman & Co.* (1) or in *Broderip* v. *Salomon.* (2) The company is recognised as a corporate body distinct from Prince, and there are no proceedings against Prince as there were against Salomon entitling the company to set aside the agreement for the sale of the business to acquire which the company was formed, or to be indemnified by the vendor against the debts which he endeavoured to saddle the company with. No such fraud as was proved in *Broderip* v. *Salomon* (2) is proved in this case; and on the materials before us the plaintiff is entitled to the usual judgment in a debenture-holder's action, with costs of the appeal.

(1) [1895] 1 Ch. 674. (2) Ante, p. 323.

LOPES L.J. It is said that the debentures are invalid on two grounds: first, on the ground that the directors had no power to issue them; and, secondly, on the ground that if they had, they improperly exercised that power.

There was another question raised to the effect that the debentures were a fraudulent preference. The last question was decided by the learned judge in favour of the plaintiff, and I agree with the decision; the two former in favour of the defendant company, and I am unable to agree with the view he has taken. The facts have been very fully stated. I will very shortly state my reason for differing from the learned judge.

The plaintiff is holder of these debentures, which are unimpeachable so far as their form is concerned. But it is said they are not issued to any creditor of the company; they are issued to the plaintiff, who is not a creditor of the company, but a creditor of Prince's, and are issued, not for the purposes of the company, but to discharge a private liability of Prince.

But is this really the case when the whole transaction is carefully looked at? The company had indemnified Prince against his liabilities, and one of those liabilities was his debt to the plaintiff. Suppose the company had issued the debentures in question to Prince, as they might have done as part of the consideration for the purchase of his business, and Prince had taken them to his bankers and raised the amount of the debt upon them, and then handed it over to the plaintiff, no question could then have been raised as to the validity of the transaction. Having regard to the fact that the company had indemnified Prince, was not what was done practically the same thing, but done in a less circuitous mode? I am of opinion that the directors had power to issue these debentures to the plaintiff, and that they were not issued without consideration.

But it is said the directors improperly exercised this power—that they did not issue the debentures quâ directors, but in their individual capacity. How can this be successfully urged? Every formality was complied with. Every requirement in the memorandum and articles of association was observed. The debentures were issued in the interest of the company quite as much as in the interest of Prince. They relieved the company from pressure

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from Prince, who was entitled to be indemnified against his liability to the plaintiff; and they released Prince from pressure from the plaintiff, who was entitled to proceed upon his judgment. The debentures were issued to carry out the object for which the company was formed—namely, the acquisition of Prince's business; and I am unable to say that the directors improperly exercised their powers in issuing them to the plaintiff.

This case is entirely different from *Broderip* v. *Salomon*. (1) The learned judge did not consider that there was anything dishonest, or fraudulent, or against the policy of the Joint Stock Companies Acts in the formation of the company, as there was in the last-named case.

RIGBY L.J. I am of the same opinion.

In the consideration of this case the learned judge has found, and we are unable to differ from him on that point, that in the promotion of the company there was no fraud intended; and he seems, amongst other things, to have drawn the conclusion that I should have drawn myself, that it was intended on the part of all the persons concerned in forming the company that the business should be carried on. Now, with reference to the debentures directed to be issued on December 4, 1893, to the plaintiff in this action, I have come to the conclusion that there was no bargain properly so called between him and Prince which would bind him to accept the debentures, or bind Prince to give them. No doubt he had been brought to say that he would accept debentures; but that was only an offer. He might have withdrawn that offer. So that there was no bargain antecedent to the formation of the company about these particular debentures. Under these circumstances, I cannot but think that under the combined operation of the memorandum and articles of association, as quoted by Lindley L.J., there was power to do what the directors did on December 4. Then it is said that they did not exercise their power for the benefit of the company, but for the individual benefit of Llewellyn Prince himself. If that were so, I do not see that there is anything to invalidate the

(1) Ante, p. 323.

action of L. Prince and of the other properly appointed director. If Prince had a personal interest, apart from the members at large, it might be so; but I do not see that he had that personal interest. He had a personal interest along with the others, because it is perfectly plain that the company, as a company, could not have gone on at all if it had not been for the arrangement made about these debentures, or some other arrangement of a similar character.

I think that disposes of the ground upon which the learned judge found these debentures invalid; and on the question of fraudulent preference I agree with what has been already said, and with what the learned judge himself said. There is no preferring of these creditors of the company to other creditors of this company. Seligman was, no doubt, a creditor of Prince's; but he was not a creditor of the company, and he was not, in that capacity, preferred to any other creditor of the company—if, indeed, there were other creditors of the company, which must have been to a very small amount, considering the very short time during which the company existed. At that time I do not think that any person contemplated the winding-up of the company. But it was soon afterwards found impracticable to raise further cash; and that fact in itself shews that the company was not in a position to pay off the plaintiff and O. Seligman or Warner otherwise than in some such way as they did.

Appeal allowed.

Solicitors: *Warner & Seligman; Thomsons, Brooks & Danby*

M. W.

C. A.
1895
July 5.

MacIVER *v.* G. & J. BURNS.

[1895 M. 140.]

Practice—Jurisdiction—Scottish Defendant—Person carrying on Business within the Jurisdiction in Name or Style other than his own Name—Service of Writ—Rules of Supreme Court, 1883, *Order* XLVIII. *A, rr.* 3, 11.

Rule 11 of Order XLVIII. A provides that "any person carrying on business within the jurisdiction in a name or style other than his own name may be sued in such name or style as if it were a firm name; and, so far as the nature of the case will permit, all rules relating to proceedings against firms shall apply."

B., a domiciled Scotsman, resident in Scotland, carried on business in Liverpool in the name of G. & J. Burns:—

Held, that this rule did not apply so as to enable the plaintiff to effect service of a writ upon B. by serving it on the person having the management and control of the business at Liverpool.

THIS was an appeal from a decision of the Vice-Chancellor of the County Palatine of Lancaster, refusing to set aside service of a writ of summons.

On June 20, 1895, the plaintiffs, C. MacIver, H. MacIver, and W. MacIver, issued a writ of summons in the Court of the County Palatine of Lancaster against G. & J. Burns, indorsed for an account as between the plaintiffs and defendants of the partnership lately subsisting between the plaintiffs and the defendants under the name of the Clyde Steam Navigation Company, for damages for breach of partnership duties, for a receiver, and for delivery up to the receiver of all books, documents, papers, and things relating to the partnership business.

The partnership in question was formed under articles dated September 24, 1856, made between James Burns, George Burns, John Burns, and Charles MacIver. The three Burnses were severally described as merchants in Glasgow, and Charles MacIver as merchant in Liverpool. Changes took place in the constitution of the partnership; and in April, 1895, the partners were Sir John Burns, Bart., and the three plaintiffs. In that month Sir John Burns gave notice to the plaintiffs of his desire to

retire from the partnership pursuant to a provision in the articles.

The plaintiffs were resident in Liverpool. Sir John Burns was a domiciled Scotsman resident in Scotland. He carried on business as a shipowner in Glasgow under the firm of G. & J. Burns, but had branch offices in different towns in England, and among others in Liverpool. It was admitted that he carried on business at Liverpool under the firm of G. & J. Burns. The business was his sole business, there being no partner.

The writ was served upon the person who had the management and control of Sir John Burns's Liverpool office, with a notice that he was served as a person having control or management of the partnership business. Sir John Burns moved to set aside the service and all subsequent proceedings on the ground that the business carried on in the name of G. & J. Burns belonged to and was carried on solely by Sir John Burns, who was domiciled and resident in Scotland.

The Vice-Chancellor of the County Palatine (Mr. Robinson) on June 25, 1895, refused the motion with costs. (1)

(1) 1895. June 25. The Vice-Chancellor. It seems to me that the reasoning of the cases of *Russell* v. *Cambefort* (23 Q. B. D. 526) and *St. Gobain, Chauny and Cirey Co.* v. *Hoyermann's Agency* ([1893] 2 Q. B. 96) applies exclusively to a foreigner, because by the comity of nations this country does not assume to pass an Act binding foreigners resident abroad. In *Russell* v. *Cambefort* (23 Q. B. D. 528) Cotton L.J. says: "Although the rule does authorize service on one member of a partnership in general terms, yet it ought to be construed only as applying to partnerships the members of which either by their nationality" (that is this very case) "or residence have become subject to English law and to the power of parliament." That is the ratio decidendi. Where partners are all of them subject to English law it is competent to the judicature to make an order for service on one of them, so as to bind any of the others who are subject to English law, which would include a Scotsman. Again, in *St. Gobain, Chauny and Cirey Co.* v. *Hoyermann's Agency* ([1893] 2 Q. B. 96) Lord Esher says (p. 102): "If the rule had contained words expressed in terms including a foreigner resident abroad, then an English Court would be bound to obey the directions of its own legislature, but when the words used are capable of one or other construction, then the Court ought to adopt the construction which will prevent an infringement upon the principles of international law by extending the jurisdiction of the English Courts against foreigners residing abroad, who have in no way submitted to that jurisdiction." With all due deference, I

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Sir John Burns appealed.

The rules hereinafter referred to had been adopted verbatim as part of the general orders of the Court of the County Palatine.

Sir R. Webster, Q.C., and *P. Ogden Lawrence*, for the appeal. The effect of this decision is that a domiciled Scotsman resident in Scotland can be sued in England because he carries on business there under the name of a firm, the matters in respect of which he is sued having no connection with that business. The service is supposed to be authorized by Order XLVIII. A, r. 11; but that rule was only intended to make people who trade under an assumed name liable to be sued in that name, and it gives no right to serve here a Scotsman who does not come to England. The whole scope of Order XLVIII. A is to deal with partnership cases, not to alter the rules as to service on persons abroad. [They were then stopped by the Court.]

Cozens-Hardy, Q.C., and *T. R. Hughes*, for the plaintiffs. The language of Order XLVIII. A, r. 11, cannot be cut down from its

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agree to every word of that, and what I am doing to-day I do not think at all contravenes what Lord Esher or Cotton L.J. said. It seems to me we are dealing with a person who is amenable to English law—English statute law—and to any order which is duly passed under the authority of an Act of Parliament, just as much as an Englishman is. It seems to me there is the broadest possible distinction between the case before me to-day and the two cases which have been referred to, and that the reasoning of the judges in those two cases rather points to this, that their judgment would not apply to a Scotsman. Mr. Lawrence has pointed out that Lord Blackburn in *Ewing* v. *Orr Ewing* (10 App. Cas. 453, 520) says: "I completely agree that, unless where some legislation (by the independent legislature of Scotland before the Union, or by the legislature of the United Kingdom since) may have made a difference, the judicatures of Scotland and England are as independent of each other as if they were the judicatures of two foreign States." Here legislation has made a difference. It has enabled Order XLVIII. A, r. 11, to be passed, and it appears to me that this motion is a mistaken one. It certainly would seem to be a most inconvenient result that a gentleman residing in Glasgow should have a business in Liverpool carried on by his agent here, but that he cannot be sued by serving him in Liverpool, where his business is. If that is the rule as to the Palatine Court, it applies equally to the High Court. Such a rule would cause very great difficulty in the way of enforcing contracts, and it seems to me that the real meaning of the rule is to give power to serve as in this case.] I must therefore refuse the motion.

plain grammatical meaning, except where it would interfere with international law. *Russell* v. *Cambefort* (1) was a case of foreigners who are not subject to the English Parliament. Scotsmen stand on a different footing from foreigners, because parliament can legislate for them. The observations of Cotton L.J. (2) shew that this distinction exists.

[*Sir R. Webster* referred to the judgment of Fry L.J. (3)]

In *Grant* v. *Anderson* (4) there is no decision of the Court of Appeal on the question whether Order XLVIII. A applies to actions against firms which have partners resident abroad. *St. Gobain, Chauny and Cirey Co.* v. *Hoyermann's Agency* (5) was the case of a foreigner, and we rely on the distinction between foreigners and Scotsmen.

[*Sir R. Webster* referred to the observation of Lopes L.J. in *De Bernales* v. *New York Herald.* (6)]

The Court of Appeal in *Worcester City and County Banking Co.* v. *Firbank* (7) overruled the opinion of the Divisional Court in *Grant* v. *Anderson* (4), and decided that Order XLVIII. A applied to all partnerships carrying on business within the jurisdiction. Then rule 11 puts an individual trading here in a name not his own in the same position as a firm carrying on business here, and service can be effected in manner provided by the order. There is a reason for this: if a man trades in his own name you know whom you have to sue; if he trades in a name not his own you can only sue him in the assumed name. The defendant being a person subject to the authority of parliament, there is no breach of international law in giving effect to the words of the rule as against him.

Lindley L.J. This is an appeal from a decision of the Vice-Chancellor of the County Palatine of Lancaster refusing to set aside the service of the writ and all subsequent proceedings in this action of *MacIver* v. *G. & J. Burns.* The action was brought by three gentlemen of the name of MacIver against Sir John Burns, sued as G. & J. Burns, and it appears from

(1) 23 Q. B. D. 526.
(2) Ibid. 528.
(3) Ibid. 530.
(4) [1892] 1 Q. B. 108.
(5) [1893] 2 Q. B. 96.
(6) Ibid. 98, n.
(7) [1894] 1 Q. B. 784.

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the indorsement on the writ that the action was a partnership action to take the accounts and wind up the business of what is called the Clyde Steam Navigation Company. The Clyde Steam Navigation Company was a partnership between the plaintiffs and Sir John Burns, and the dealings and transactions of that partnership relate to the sailings of steamships from the Clyde. Now, Sir John Burns being sued simply as a member of that firm, and being a domiciled Scotsman not residing here, and having nothing whatever to do in this country so far as that cause of action is concerned, nevertheless does carry on business in Liverpool under the name of "G. & J. Burns," and in consequence of that circumstance he is sued under that firm name, as I will call it, and the writ is served in Liverpool upon the person having the management of his business there. The question is whether that is right.

Now, apart from all rules, let us consider the matter on principle. Here is a partnership action between certain partners. The proper parties to that action are the individual partners. Sir John Burns is not described in the partnership articles as carrying on business under the name of G. & J. Burns. Whether it would have made any difference if he had been so described, I do not pause to inquire. Now, being sued in respect of that partnership business, and being a Scotsman domiciled in Scotland, and not being resident here, if he is to be sued at all in this country, it ought, primâ facie, to be under Order XI., which relates to the service on and suing of persons not resident in this country. But then it is said that as he carried on business in Liverpool under the name of G. & J. Burns, he can be sued under rule 11 of Order XLVIII. A. Order XLVIII. A refers to actions by and against partnerships. The first ten rules of it relate to actions by and against partnerships only. Partnerships can now be sued in the name of the firm, whereas formerly they could only be sued in the names of the persons who composed the firm. It was necessary to frame some rules to carry out the new procedure, and rules 1 to 10 of Order XLVIII. A are addressed solely to suits against partnerships. Then comes rule 11, which has really nothing to do with the partnership rules, but which is tacked on to apply to the case of a single individual who carries

on business, either in the name of a firm, or, as it is expressed in the rule, under some name other than his own. Rule 11 is this: "Any person carrying on business within the jurisdiction in a name or style other than his own name may be sued in such name or style as if it were a firm name." Pausing there, that does not give the Court any power to sue a person abroad in the firm's name. Then the rule runs on: "and so far as the nature of the case will permit, all rules relating to proceedings against firms shall apply." That throws us back upon what I may call the code of rules relating to firms—rules 1 to 10. Unquestionably those rules have to a certain extent altered the law as it was laid down in *Russell* v. *Cambefort*. (1) The law is altered to this extent, that if two or more persons being foreigners resident abroad carry on business in this country in partnership, you may sue them under the firm name, and get judgment against the firm, which judgment can be executed against its assets in this country. But when you come to apply that to a single individual it will not work, because there are no joint assets. In the case of a firm consisting of two or more persons, a judgment against the firm will only affect the joint assets, and cannot be made the foundation of a claim on the assets of the individual partners. A judgment against an individual who carries on business is against him and him only. Therefore the analogy does not apply. A person desiring to proceed against a single person, if he is a foreigner or a Scotsman, must go under Order XI., and cannot proceed under Order XLVIII. A, r. 11.

Now, consider what is the object of rule 11. It is to authorize the suing persons in the name in which they carry on business—to facilitate the carrying on of actions against persons who conceal their names, and for that purpose the rules relating to actions against firms are to be applied as far as possible; but they cannot be applied to a case not within the reason of the rule. If a man contracts debts with his baker or butcher in his own name, and carries on business under a name not his own, the baker or butcher cannot sue him under the name not his own. Why should he? The reason of the rule does not apply to the case. The words in rule 11, "may be sued in such name or

(1) 23 Q. B. D. 526.

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style as if it were a firm name," furnish the key to the whole difficulty. I do not say the rule expressly states, but it involves this: that you can only sue a man in his firm name in respect of matters which are connected with the business which he carries on under that name. Now, supposing that Sir John Burns in this case had a partner, and carried on business in Liverpool under the name of G. & J. Burns, you could not sue him in such an action as this in that firm name, because that would embrace somebody who had nothing whatever to do with the cause of action. If Sir John Burns carried on business in partnership under the firm of G. & J. Burns, this action clearly would not lie against that firm.

It appears to me that there has been a confusion of thought in this case and a mistake, which is to my mind palpable when you look at the reason of the thing; and I must say that, if we were to uphold this order, we should be sanctioning a course which would give rise to a great outcry, and a very legitimate outcry, on the part of Scotsmen and foreigners. The right course here is to sue Sir John Burns in his own name, and apply for leave to serve him under Order XI.

LOPES L.J. I am entirely of the same opinion. I think the learned Vice-Chancellor has misconceived the effect of rule 11 of Order XLVIII. A. That rule was not intended to apply to a case like the present: it was intended to apply to the case of an individual who carries on business in an assumed name—such, for instance, as an individual who carries on business under the name of "Waukenphast," or under the name of "Madame Louise," the real name being in each case an entirely different one. The object of the rule was simply to apply to cases of that kind, and to remove the difficulty which existed in suing persons who traded under an assumed name.

I entirely agree with what has been said by Lindley L.J. as to the outcry which would arise if we were to support the order under appeal. I think that a greater storm would arise than arose on a previous occasion when Scotsmen considered themselves aggrieved by a case decided in this Court.

RIGBY L.J. I am of the same opinion. First of all, let us consider the literal meaning of the words of rule 11: "may be

sued in such name or style as if it were a firm name." That is to say, he may be treated as though he were a member of a firm carrying on business in a firm name. It appears to me that those words necessarily limit the operation of rule 11 to cases arising out of that carrying on of a business. This is not a case so arising, and it would appear to me to be altogether wresting the rule to attribute to it the meaning which has been given to it by the Vice-Chancellor.

With regard to the argument that Scotsmen in a case of this kind are to be treated as in a different position from foreigners, I cannot accede to it. Of course, Scotsmen are not foreigners. They are fellow-subjects of ours, and they are in the same position as any other fellow-subjects, with the important exception that their system of jurisprudence differs in very important particulars from ours—that there are such differences between our system and theirs, that if you find words which confer a jurisdiction upon our English Courts in general terms, you do not assume them to apply to Scotsmen where they would not be held to apply to foreigners. Parliament, of course, may legislate for Scotsmen as it may legislate for Frenchmen, so far as they are concerned in matters of litigation in our Courts; but mere general language will not be construed necessarily to apply either to foreigners or to Scotsmen. That is, I think, the meaning that is to be attributed to the reasoning in the judgments already cited, and to call a Scotsman an English subject is a perfect absurdity. No one can ever construe words which have express reference to English subjects—as was said in one case by the Master of the Rolls—as having reference to Scotsmen.

Solicitors: *Bircham & Co., for Batesons, Warr & Wimshurst, Liverpool, for Moncrieff, Barr & Paterson, Glasgow; Hill, Dickinson & Co., Liverpool.*

H. C. J.

C. A.
1895
KEKEWICH J.
March 5, 6; *April* 3.
C. A.
July 3, 5, 6, 8, 12.

HICKMAN *v.* BERENS.

[1891 H. 1712.]

Compromise—Client and Counsel—Mistake—Procedure—Evidence of Counsel, how given.

Where, acting upon general instructions given by a client to his counsel to compromise a litigation, counsel consents to a compromise under a misapprehension, such as where, intending to concede one thing, he inadvertently concedes another, or where the counsel on both sides are not ad idem, neither the counsel nor the client is bound by the compromise, and the Court will set it aside.

Holt v. *Jesse* (3 Ch. D. 177) approved of.

Upon the question of the extent of the authority given by a client to his counsel to compromise litigation to which the client is a party, the Court will accept the statement of counsel if made from his place at the bar, without requiring it to be made on oath.

THE plaintiff, Isaac Hickman, had for many years acted as the agent in Calcutta for the sale of goods supplied to him by the defendants, Berens & Co., an English firm of merchants, under a written agreement between the parties, one of the terms being that the plaintiff should receive as remuneration a sum equal to 45 per cent. on the clear net profits of the defendants' business; and for the purpose of ascertaining such profits the business was treated as one of partnership between the plaintiff and the defendants.

The defendants, on purchasing goods in England for shipment abroad, were in the habit of receiving discounts from manufacturers. Two discounts, and sometimes more, were usually allowed in respect of each purchase, and it was the practice of the defendants to allow the plaintiff part of those discounts, but not the whole.

Disputes eventually arose between the parties, and in 1891 Hickman brought this action against Berens & Co. for accounts, including an account of discounts received by the defendants and alleged not to have been brought into the profit-and-loss account furnished to him by the defendants. The defendants admitted having received certain discounts, but claimed to be entitled to keep them for themselves.

On July 31, 1892, Romer J. ordered the accounts, which extended over many years and were of a complicated character, to be taken before the official referee, including in such accounts the discounts retained by the defendants, but the defendants to be allowed to retain "discounts which they have bonâ fide obtained for cash payments."

The action came on before the official referee in July, 1894, and on July 11 a memorandum containing the terms of compromise was signed in Court by the then leading counsel for the parties, the principal terms being, "ascertain the amount in excess of 5 per cent. retained by defendants in respect of discounts for the years 1884 to 1890 . . . . Defendants to account to plaintiff for 45 per cent. of the excess retained by them over 5 per cent. as so ascertained." The plaintiff was himself present in court, and assented to a compromise being made. No formal order embodying the terms of compromise was drawn up, but the official referee directed delivery of objections on the accounts when taken.

Upon the delivery of objections by the defendants to the plaintiff's accounts, the plaintiff, as he alleged, for the first time ascertained that the defendants gave a wider application to the terms of the compromise than he, the plaintiff, intended, his view being that the compromise was never intended to apply to such discounts as, by reason of their large amount, were, as he alleged, indubitably trade discounts, but was only intended to apply to smaller, or, as he called them, "doubtful" discounts—that is, discounts of which, from their amount, it could not be well inferred whether they were trade or cash discounts.

The defendants, on the other hand, took the view that, according to the terms of compromise, they were to be allowed 5 per cent. on all discounts retained, whether cash or trade. As the result of taking the accounts upon the defendants' interpretation of the compromise would be very adverse to the plaintiff, he took out a summons before the official referee for directions, but the official referee adopted the defendants' construction of the compromise. The plaintiff then, on December 13, 1894, applied to the official referee by summons to be relieved of the compromise on the ground of mistake, but the official referee

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held that, as the plaintiff's leading counsel had signed the compromise, he, the plaintiff, was bound by it.

The plaintiff then took out the present summons by way of appeal before Kekewich J. to reverse the official referee's decision. Upon the summons coming on before his Lordship, affidavits were read on the part of the plaintiff shewing in what sense he understood the terms of compromise, and stating that it was not until the defendants (pursuant to the official referee's order) delivered their objections to his, the plaintiff's, accounts, that he discovered the defendants' extended construction of the terms of compromise; that he never intended that the defendants should be allowed 5 per cent. on all discounts retained, whether cash or trade; that he gave no instructions to his counsel to agree to such terms, and did not believe that counsel intended to agree to them; that his intention was that the 5 per cent. should apply only in doubtful cases, but not in cases where the discount was so large as to be manifestly a trade discount; that if the true construction of the compromise was that it referred to all discounts without distinction, it was signed by mistake, and that he never intended to authorize his counsel to give up any part of the undoubted trade discounts, but merely to consent to a compromise so as to get over the difficulty of determining, in doubtful cases, whether the discount was a cash discount or a trade discount.

A transcript of the shorthand notes of the proceedings before the official referee was also read, but his Lordship expressed a desire to hear from the plaintiff's leading counsel himself a statement as to what occurred before the official referee, and as to what he, counsel, understood when he signed the compromise. The question then arose whether, inasmuch as he was not retained as counsel on the present summons, such statement should be given by him as a witness on oath in the ordinary way, or from his place at the bar. During an adjournment of the hearing of the case, his Lordship was informed of a recent case of *Kempshall* v. *Holland*—an action for breach of promise of marriage—in which it appeared that a similar question had arisen before the Court of Appeal; and at his Lordship's request the reporter of the present case communicated with Mr. Witt, Q.C., who had at one time

been concerned as counsel in the case referred to. Mr. Witt then wrote the reporter a letter giving the following account of the case: "In the case of *Kempshall* v. *Holland*, in the Court of Appeal, *coram* Lord Esher M.R. and Lopes and Rigby L.JJ., February 19, 1895, the plaintiff moved for an order to set aside an alleged compromise and for a new trial on the ground that she had not assented to the compromise, and the question was whether she had authorized me to make the compromise in question. I attended the Court, and upon the Court inquiring whether I was willing to make a statement I said that I had written out a statement and that a copy of it had been supplied to both parties, and that I had also put it in the form of an affidavit, in case the Court required an affidavit, but desired to leave it to the Court whether the affidavit ought to be used. Lord Esher said they would never admit an affidavit in these cases, but trusted to the honour of counsel, and asked if the statement might be read. I assented, and it was then read by counsel for the appellant and commented on by him. The Court then asked me some questions arising on the statement, which I answered from my place in the front row." The reporter then sent the letter to his Lordship, with a reference also to a notice of the case in an article in 98 *Law Times*, p. 489, headed "The Authority of Counsel to Compromise."

Subsequently at his Lordship's request, the leading counsel who had appeared for the plaintiff before the official referee attended and made his statement from his place within the bar, having been formally briefed on behalf of the plaintiff for the purpose. His statement was, shortly, to the effect that on returning to the official referee's court on July 11, 1894, after a temporary absence in another court, he found the parties and their advisers discussing terms of compromise as to what discounts should be brought into the accounts; that he thereupon proceeded to take part in the discussion, addressing his mind not to trade discounts as to which, in his opinion, there had not been and could not be any doubt or dispute, but to discounts as to which there was a doubt whether they were "bonâ fide cash discounts," and therefore discounts allowed by Romer J.'s order to be retained by the defendants, or whether they were in fact

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"trade discounts"—and as such liable to be brought into the accounts; that his intention was that the compromise should cover only those doubtful cases; that he had no intention to give up cases as to which in his opinion there was no doubt, being so large, that they were manifestly trade discounts; and that, if he had understood the compromise was to cover such cases, he would not have signed his consent to it. He admitted that he had, by mistake, given a consent which he ought not to have given.

Bramwell Davis, Q.C., and *R. B. Cator*, for the plaintiff. A compromise by counsel under a mistake, or under a misapprehension of the intentions of his client, is not binding on the client: *Holt* v. *Jesse* (1); *Harvey* v. *Croydon Union Rural Sanitary Authority* (2); *Lewis's* v. *Lewis* (3); *In re West Devon Great Consols Mine.* (4) *Matthews* v. *Munster* (5) is a different case, for there the compromise was made by counsel on his own authority without any instructions from his client. Here counsel had instructions but misunderstood the effect of them.

Reed, Q.C., and *R. McKenna*, for the defendants were not called upon.

KEKEWICH J., after stating the circumstances under which the memorandum of compromise was signed, and observing that he had followed the precedent in the above-mentioned case of *Kempshall* v. *Holland*, which seemed to him to lay down the proper course to pursue, and that he had now had the advantage of the statement of the plaintiff's leading counsel as to what was his view of the compromise before the official referee, continued:—I have not the case here of counsel relying upon his mere authority as counsel to do what is best for his client in the conduct of litigation. Nor have I the case where the client has given specific instructions and then counsel has departed from them, as in *Lewis's* v. *Lewis.* (3) The question here arose respecting discounts—cash discounts and trade discounts. What the concession made by the terms of compromise actually was,

(1) 3 Ch. D. 177.
(2) 26 Ch. D. 249.
(3) 45 Ch. D. 281.
(4) 38 Ch. D. 51.
(5) 20 Q. B. D. 141.

the plaintiff may probably not have been informed. To my mind, the only inference I can draw from the facts before me is that he intended to leave the matter in the hands of his counsel. Having once agreed that it was a case for a compromise, he intended to trust his counsel, as he thoroughly might, to make the best terms they could as regards that particular dispute. That seems to me to dispose of the suggestion of the client not having been informed of, or misapprehending, what was done.

The question is whether the plaintiff's leading counsel was misled when he signed the compromise. The written agreement signed by the leading counsel for the plaintiff and the defendants is, in language, perfectly clear: there seems to be no room for doubt about it at all. But then the plaintiff's leading counsel says, "We did not understand what the effect would be." Now, having heard his statement at the bar, and also having read the shorthand notes of what took place, my conclusion is this—that neither he nor his junior counsel, nor his client, understood precisely how far that concession would go: that nobody present, probably neither the plaintiff, nor the leading or junior counsel, did see what a large concession they were making; that is to say, how far it would work out against themselves on taking the accounts. But that is the very essence of a compromise. You cannot compromise, in the proper sense of "compromise," rights which you fully appreciate and understand. In that case there is no such thing really as "compromise," in the proper sense of the word. Take the common case of ejectment: if there is no will and the heirship is clearly proved, there is no room for compromise. The heir may make some concession to the party whom he is seeking to eject; for instance, he may say, "I will not insist on costs," or "You shall not go out till next year." That is a unilateral concession, not a compromise. The essence of a compromise is that the two parties come together and agree to give and take because they are not quite certain what, in the ultimate result, supposing they continue the litigation, their strict legal rights will be declared to be.

I accept the statement of the plaintiff's leading counsel without cavil. I accept the statements of the witnesses on the

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part of the plaintiff in their affidavits, that they did not see what large sums they would have to allow under this compromise; but that is a mere question of amount, and it has unfortunately worked out more disadvantageously to them than they expected. That, however, is not the essence of the compromise. The parties desired, and properly so, to avoid this troublesome, lengthy and costly investigation, with disputes as regards every item, and it was necessary that at least one of them should give up something more than he was bound to give up. They have done that and the plaintiff has miscalculated the pecuniary value of the concession. In one sense it may be that he has made a mistake, but I cannot hold that he made a mistake in assenting to this agreement in the terms in which it was signed. He has taken his chance of how it would work out and he has failed. The result is that this application fails, and the applicant must pay the costs of it.

C. A.

The plaintiff then, by leave, appealed, his notice of appeal asking that the order of Kekewich J. might be reversed, and that it might be ordered that the accounts directed to be taken under the order of Romer J. might be taken without reference to the compromise or consent, upon the ground that such compromise or consent was entered into, and the plaintiff's consent given thereto, by reason of a mistake and misapprehension.

The appeal was heard on July 3, 5, 6, 8, 1895.

Crackanthorpe, Q.C., and *R. B. Cator*, for the plaintiff. The Court will not force a compromise upon a party who entered into it under a mistake as to its terms. The question is what were the real terms of the compromise here. It is clear from counsel's statement that the parties were not ad idem, and as it is evident that he gave his consent under a misapprehension the Court will not hold his client bound by it: *Harvey* v. *Croydon Union Rural Sanitary Authority* (1); *Holt* v. *Jesse* (2); *Bathurst* v. *Stanley* (3); *Lewis's* v. *Lewis.* (4) We admit that where there is no surprise a party cannot arbitrarily withdraw his consent.

(1) 26 Ch. D. 249, 255.
(2) 3 Ch. D. 177, 183-4.
(3) Cited in *Holt* v. *Jesse* (3 Ch. D. 180).
(4) 45 Ch. D. 281.

[LINDLEY L.J. referred to *Watson* v. *Marston* (1) as an authority that the Court will not enforce specific performance of a contract where both the parties to it are under a mistake.]

Reed, Q.C., and *Maugham*, for the defendants. We accept absolutely and implicitly counsel's statement of what his understanding of the compromise was; but our view is this: Some one uses certain words to express an agreement: he cannot be heard to say, "Though I thought I was expressing my intention by those words, I intended something else." It is clear, on general principles, that one party to a contract can never defend himself against it by setting up a misunderstanding on his part as to the real meaning and effect of the contract or any of the terms in which it is expressed; to permit such a defence would be to open the door to perjury and to destroy the security of contracts: Fry on Specific Performance (3rd ed. p. 356, § 765); *Stewart* v. *Kennedy* (2); *Hart* v. *Hart*. (3) A mistake purely of one party to a contract, not induced by the other, is not a ground for rescission of the contract at the instance of the party making the mistake: *Scott* v. *Littledale*. (4) In the present case we never said anything about giving up altogether the discounts we had claimed. We meant to retain all we had been accustomed to claim, and not to allow a farthing of it to the plaintiff.

Crackanthorpe, Q.C., in reply.

Cur. adv. vult.

July 12. LINDLEY L.J., after stating the facts leading up to the summons before Kekewich J., proceeded:—The summons was taken out to be relieved from the terms of the compromise or consent upon the ground that the two parties who signed it were really thinking of different things, and had their minds addressed to different things, and that they did not understand or agree to the same thing. That is the short ground upon which it is put. The plaintiff took out the summons upon this theory: he says that what his counsel was aiming at in signing this document and entering into this arrangement as to the mode of taking the accounts was this—he assumed that there were certain discounts which could not possibly be disputed, which

(1) 4 D. M. & G. 230.
(2) 15 App. Cas. 108.
(3) 18 Ch. D. 670.
(4) 8 E. & B. 815.

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nobody would ever suggest could be; and he says, "My counsel's attention was addressed to that which he considered could be disputed: he never dreamt of saying or agreeing to anything which could possibly relate to matters as to which he conceived at all events there could be no possible dispute." Now, I am bound to say the language of the document signed is more extensive than that; and the real difficulty which we have to ascertain and to solve is this—whether, when the plaintiff says that (and the plaintiff's counsel, in his statement before Kekewich J., says in substance what I have mentioned) that is really the truth, or whether he has been inaccurate to this extent, that what he finds now is that this document has a consequence which he did not foresee; if that was all, there would be no ground, in my opinion, for relieving him from it.

But on looking at the case and hearing both sides, the conclusion at which I have arrived is that the plaintiff's version is correct, and that the two parties did not mean the same thing. The counsel for the defendants meant exactly what the document expresses—they were bent upon what I may call a "compromise" of all these items in the account. The plaintiff's counsel, however, never addressed his mind to that possible view of the case. He addressed his mind to a much narrower view of the case, and he put it in this way—and I am convinced, on looking at the evidence, that he is right from his point of view. He said, "It never occurred to me as possible that what I was signing and alluding to could be construed so as to apply to matters which I did not suppose could ever be disputed, that is to say, the large trade discounts."

Looking, then, at the evidence, and notwithstanding Mr. Reed's very cogent argument in support of his view, I have come to the conclusion that there was that misunderstanding; and, there having been that misunderstanding, I think we are acting quite in accordance with the course of the Court in relieving the party who has made it from the consequence of it, bearing in mind that the document has never been formulated into an order or anything of the kind. The principle upon which we act is the principle upon which the Court acted in *Holt* v. *Jesse* (1), which

(1) 3 Ch. D. 177.

is to the effect that if counsel does sign a document like this, and comes and tells the Court it must have been a mistake of the kind which I have alluded to, that is to say, either a mistake of fact—which I do not think there was here—or that they were not ad idem, and that he was compromising, or thinking he was compromising, one thing whilst he inadvertently expressed himself so as to enlarge the subject-matter of the compromise, it is almost a matter of course to set that compromise aside and not to hold the client bound by it.

It appears to me, therefore, that the plaintiff's case is made out, and that he is entitled to an order that the accounts shall be taken under Romer J.'s order without regard to this signed consent.

With regard to the costs, the plaintiff ought to pay the costs of the summons and hearing before the official referee to set aside the mistake, the mistake being on the part of the plaintiff. The order of Kekewich J. must be discharged, and there must be no costs of either side, either of the appeal to him or of the appeal to us. We take that to be as near justice in the matter of costs as is possible.

LOPES L.J. After very careful consideration I have come to the conclusion that the learned counsel for the parties were not ad idem with regard to the compromise. I am of opinion that they had different views in their minds as to the meaning of the compromise at the time it was signed. It has never been formulated or perfected in any way. It appears to me that the plaintiff's counsel thought there were undisputable trade discounts, and that such undisputable trade discounts were not to be covered or affected by this compromise. He thought it was only to extend to discounts upon which there was a doubt as to whether they were "bonâ fide cash discounts or trade discounts."

On the other hand, I have not the slightest doubt that the defendants' leading counsel thought that the compromise was to cover all discounts, and that there were not any discounts at all —either large trade discounts, or otherwise—that were not in dispute. It seems to me, therefore, that the learned counsel for both parties approached the compromise from different directions.

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They had different views as to the subject-matter which was to be affected by that compromise.

If that is so, there is plenty of authority for the Court doing that which it is about to do, namely, setting aside the compromise. What was said by Malins V.-C. in *Holt* v. *Jesse* (1) appears to me to be very applicable, assuming that I am correct in the conclusion that I have arrived at, namely, that the learned counsel were not ad idem. I find in *Holt* v. *Jesse* this passage (2): "Therefore, I entirely concur with what the Master of the Rolls has said in the passage"—in *Bathurst* v. *Stanley* (3)—"which Mr. Kekewich has pressed upon me, and I also would desire to say this, that where there has been a misapprehension on the part of counsel, where the case has been complicated or difficult, where either the materials have not been sufficiently before the counsel, or being before him, he does not fully comprehend them, or may be excused for not having comprehended them, and consent has been given prejudicial to the client, I should entirely agree with the observation of the Master of the Rolls: 'If the counsel says, I made a concession under a misapprehension, it never has been, and I trust it never will be, the course of the Court to bind the counsel to that mistake.'"

Then the learned Vice-Chancellor proceeds, in his own words, thus: "I say precisely the same thing in precisely the same terms, that if consent has been given under a misapprehension, or from a misstatement, or want of materials, and if all the information which counsel ought to have when he gives a consent is not before him, it never has been the rule of this Court, and I also trust it never will be the rule of this Court, that the unfortunate client should be bound by such misapprehension."

I am of opinion that there was a misapprehension here such as I have described, and that this compromise ought to be set aside. I also agree with what has been said by my learned brother with regard to the costs.

RIGBY L.J. I am of the same opinion. If this were an attempt to get rid of a compromise because it turned out to be,

(1) 3 Ch. D. 177. (2) 3 Ch. D. 183.
(3) Cited in *Holt* v. *Jesse* (3 Ch. D. 180).

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pecuniarily, very onerous to the party seeking relief, I think it ought not to be entertained, or, at any rate, it ought not to succeed. But I do not look upon the case in that light at all. I consider that it is quite plain that the plaintiff's counsel, in signing this document, had not present to his mind that it was intended to cover every conceivable case of discount, but that he thought he was compromising doubtful cases only, and not, of course, giving up those cases that were not doubtful but plain. If that was the real state of his mind—and I am satisfied it was—then the compromise was thought by one party to be more extensive than the other party intended it to be; that is to say, they were not agreed upon the subject-matter of the compromise: and in that case I conceive it is right that the compromise should be dealt with as if it had never been entered into. The appeal must be allowed, and I agree with what has been said as to costs.

Solicitors: *H. Bentwitch; W. B. Styer; McKenna & Co.*

G. I. F. C.

In re NOTTAGE. JONES *v.* PALMER.

C. A. 1895 KEKEWICH J. *May* 24. C. A. *July* 12.

[1895 N. 368.]

Will—Gift, whether Charitable—Purpose beneficial to the Community—Gift to encourage Sport of Yacht Racing—Perpetuity.

A testator bequeathed a fund in trust to provide annually for ever a cup to be given to the most successful yacht of the season, stating that his object in giving the cup was to encourage the sport of yacht-racing:—

Held (affirming the decision of Kekewich J.), that a gift for the encouragement of a mere sport, though it might be beneficial to the public, could not be upheld as charitable.

ADJOURNED SUMMONS.

Charles George Nottage, who died on December 24, 1894, by his will dated October 27, 1894, made the following bequest: "I bequeath to the Yacht Racing Association of Great Britain, out of such part of my estate as may be legally bequeathed for such a purpose, the sum of 2000*l.*, the same to be invested in the

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names of three trustees to be appointed by the council of the said association, and to be invested in the debenture bonds or debenture stock of any railway in the United States of America paying at the time of investment not less than four per cent. per annum upon the amount invested, but so that not more than one-fourth of the capital shall be invested at the same time in the same security, or in such other securities as the trustees so to be appointed as aforesaid shall deem expedient. And I direct that the trustees so to be appointed as aforesaid shall out of the annual income of the trust fund purchase annually a cup to be called 'The Nottage Cup,' which is to be given to the most successful yacht of the season of over nineteen rating or what may in future be held to be the equivalent of that rating, and the council of the said association shall decide annually which yacht has in their opinion the best claim to the cup, and in the event of there being any difference of opinion the vote of the majority of the said council is to decide the question, or the said council may if they think fit order the said cup to be specially raced for. My object in giving this cup is to encourage the sport of yacht-racing. And I declare that in the event of the Yacht Racing Association being dissolved or ceasing to exist, the trustees of the said fund shall pay and make over the same to three trustees to be appointed by the council or committee of the Royal Thames Yacht Club by whom the said fund shall be held upon similar trusts to those hereinbefore declared with regard to the purchase of a cup to be called 'The Nottage Cup.'"

An originating summons was taken out by the executors of the will as plaintiffs against the Yacht Racing Association of Great Britain and other persons beneficially interested under the will as defendants, asking for the determination of various questions, and in particular whether the legacy of 2000*l.* given by the will to the Yacht Racing Association was a valid bequest.

The summons was heard before Kekewich J. on May 24, 1895.

Fawcus, for the plaintiffs.

Warrington, Q.C., and *Kenyon Parker*, for the Yacht Racing Association. This is a good charitable gift. It comes within the wide definition of charity given in *Commissioners for Special*

Purposes of Income Tax v. *Pemsel* (1); it is for a purpose "beneficial to the community" within the words of Lord Macnaghten in that case, and "useful to mankind" within the words of Sir J. Romilly M.R. in *University of London* v. *Yarrow*. (2) In *In re Lord Stratheden and Campbell* (3) Romer J. held that a gift of an annuity to be provided to a volunteer corps on a specified event was a gift for charity. The promotion of yacht-racing is highly beneficial to seafaring men and to the community at large. [They further contended that if the gift was not charitable, it was valid as being (*a*) a gift to the association absolutely, who alone were interested in the subject-matter; or (*b*) a gift with a trust appended, which trust being void for perpetuity, the gift prevailed.]

Pattullo, for the residuary legatees. The purpose of this gift was not charitable. Yacht-racing is the sport of a privileged few; and if this gift could be upheld as charitable, so might a gift for a prize to the most successful jockey of the year. The case of a volunteer corps is entirely different. Volunteers are within the very words of the preamble of the statute of 43 Eliz. c. 4 (reproduced in the Mortmain Act, 1888 (51 & 52 Vict. c. 42), s. 13, sub-s. 2), which refers to the "settinge out of souldiers." The support of a volunteer corps is a relief to taxation, and there is no analogy between such a corps, which is formed for the public defence, and a purely voluntary association for the purposes of sport. The object of the testator was not to benefit the community, but to perpetuate his own memory. Even if the gift can be treated as made for the benefit of a class, that class, namely, yachtsmen, is not sufficiently large to render the gift charitable; but it is within such cases as *Carne* v. *Long* (4), where a gift for the benefit of the Penzance Public Library was held not to be charitable, *Thomson* v. *Shakespear* (5) and *Re Dutton* (6); and see *In re Dean*. (7) In every case where a gift has been held to be charitable the effect of the gift has been to relieve some one from a legal or moral obligation. There is

(1) [1891] A. C. 531, 583.
(2) 23 Beav. 159; affirmed on appeal, 1 De G. & J. 72.
(3) [1894] 3 Ch. 265.
(4) 2 D. F. & J. 75.
(5) 1 D. F. & J. 399.
(6) 4 Ex. D. 54.
(7) 41 Ch. D. 552, 556.

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no legal or moral obligation on any one to provide a prize for a mere sport. [He was not called upon to argue upon the other two points.]

Pattullo, *Freeman*, and *W. A. Peck*, appeared for other parties.

Warrington, *Q.C.*, in reply. The preamble of the statute of Elizabeth refers to "the aide or ease of any poore inhabitant concerninge paymente of fifteenes, settinge out of souldiers and other taxes." It is therefore the aid of the poor, and not the setting out of soldiers, which is declared to be a charitable object; and Romer J. appears to have decided *In re Lord Stratheden and Campbell* (1) solely on the general ground that the object of the gift was beneficial to the community. This gift is for the purpose of encouraging yacht-racing, and not for the benefit of the individual members of the association, and that circumstance takes the case entirely out of such authorities as *Carne* v. *Long* (2), *Thomson* v. *Shakespear* (3), and *Re Dutton*. (4) The promotion of yacht-racing conduces to the building of ships and the acquisition of a higher degree of skill in navigation—objects which in a country like England must be beneficial to the community.

[KEKEWICH J. referred to *Incorporated Society* v. *Richards*. (5)]

KEKEWICH J. I regret to find myself compelled to say that this gift is not good, and cannot be supported on the ground that it is a charitable gift. [His Lordship read the words of gift above set out, and continued:—]

The terms of the gift over are important in reference to the first question—namely, whether the gift is a perpetuity. The testator has carefully provided for the event of the Yacht Racing Association being dissolved or ceasing to exist, and has substituted for them in that event the Royal Thames Yacht Club; and although there is no further gift over, and the testator has not in words contemplated the possibility of the non-existence of the last-mentioned club, yet I think he has clearly shewn his intention that the fund should be applied in perpetuity upon

(1) [1894] 3 Ch. 265.
(2) 2 D. F. & J. 75.
(3) 1 D. F. & J. 399.
(4) 4 Ex. D. 54.
(5) 1 D. & War. 258.

trust to provide a cup to be continued annually for ever. Those considerations dispose, I think, of the argument which was addressed to me that the gift is a gift out and out, and not in perpetuity, and I can only uphold this gift, if at all, on the ground that it is for a charity.

Upon that question I confess that I have felt considerable doubt, because I think it is clear that the building of yachts, and the employment of persons in sailing them from time to time, is an object of great public advantage, coming within the words used by Lord Macnaghten in the case of *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (1), as being a purpose "beneficial to the community." Anything which upholds the reputation and promotes the maritime influence of England must be for the benefit of the community. If, therefore, I could see my way to holding that to be an object of this gift, I think I should be right in holding it to be a charitable gift, in the same way as in the case of *In re Lord Stratheden and Campbell* (2) Romer J., without apparently hearing much argument on that particular point, held that a gift for the benefit of a volunteer corps was a charitable gift—not, it would seem, because it came within the actual words of the statute of Elizabeth, but because it was for a purpose directly beneficial to the community. In order to uphold this gift as charitable, I think I ought to see that it is by itself, directly and as its necessary and intended result, beneficial to the community. Almost any gift may in some sense be said to be beneficial to the community. The gifts which were held not to be charitable in such cases as *Carne* v. *Long* (3) and *Thomson* v. *Shakespear* (4) were for purposes beneficial to the community, though perhaps only to a small portion of it. A testator may direct that money shall be spent in such a way as will be beneficial to the community indirectly, not in the particular way contemplated by him, but in some other way. Any man who spends his income, whether large or small, benefits the community by putting money in circulation. But in order to find that a gift is charitable, the Court must come to the conclusion that the benefit of the

(1) [1891] A. C. 531, 583.
(2) [1894] 3 Ch. 265.
(3) 2 D. F. & J. 75.
(4) 1 D. F. & J. 399.

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community is the direct, and not the remote, object of the gift.

What, then, is the meaning and object of this gift? It has been argued that all that this testator cared for was the honour and glory of the "Nottage Cup." I do not think it was only that. His own words are: "My object in giving this cup is to encourage the sport of yacht-racing." As I have said, yacht-racing implies the building of yachts and the employment of a large number of persons in constructing, not merely the hulls, but all the fittings and equipments of yachts in the largest sense. The racing of the yachts when built employs a large number of men, who are educated in the management of vessels which may become useful for the defence of the realm. But this testator had not these objects in view when he made this gift. He has told us that his object was to encourage the sport of yacht-racing. I cannot bring myself to hold that the sport of yacht-racing is beneficial to the community in the sense in which that phrase is used by Lord Macnaghten in the case in the House of Lords and by other learned judges. I cannot see that the benefit of the community is the natural direct and necessary result of this gift; and though I am far from saying that the result of the gift is not beneficial, I must hold that it is not beneficial to the community so as to constitute this a charitable gift. The consequence is that the gift fails.

C. C. M. D.

C. A. The Yacht Racing Association appealed. The appeal was heard on July 12, 1895.

Warrington, Q.C., and *Kenyon Parker*, for the appeal. This gift comes within the wide definition of a charity given by Lord Macnaghten in *Commissioners for Special Purposes of Income Tax* v. *Pemsel.* (1) Yacht-racing tends to train sailors and to encourage shipbuilding; it employs a large number of the seafaring population, and makes them handy in the management of vessels; it is therefore highly "beneficial to the community." In *In re Lord Stratheden and Campbell* (2) a gift in favour of a volunteer corps failed because it was not to come into effect till

(1) [1891] A. C. 531, 583. (2) [1894] 3 Ch. 265.

after a period exceeding the limit allowed by the rule against perpetuities; but Romer J. gave his opinion that it was a charitable gift. So in *In re Stephens* (1) a gift to the National Rifle Association to be expended in teaching shooting at moving objects was held charitable.

[RIGBY L.J. referred to *Thomson* v. *Shakespear*. (2)]

The ratio decidendi there was that it was a gift to establish a museum for the benefit of the owners of a particular house. In *Loscombe* v. *Wintringham* (3) a gift "for the increase and encouragement of good servants" was held charitable; and in *Beaumont* v. *Oliveira* (4) the diffusion of geographical knowledge was held a charitable object. It is difficult to draw the line as to what is sufficiently beneficial to the public to be a charitable object. It may be said that every healthy sport is beneficial to the public; but where its object is the amusement of those who engage in it, and it is only beneficial to the public so far as it promotes their health and bodily well-being, it is, we admit, without the line. Here there is a public benefit—not merely a benefit to those who engage in the sport of yacht-racing.

Pattullo, for the residuary legatees, was not called upon.

LINDLEY L.J. I cannot go the length of holding this to be a charitable gift. There is great difficulty in drawing the line between gifts which are charitable, in the wide sense in which lawyers use the term, and gifts which are not charitable; but this gift is, in my opinion, decidedly beyond the line. It is a prize for a mere game. The testator himself tells us what was in his mind: "My object in giving this cup is to encourage the sport of yacht-racing." Now, I should say that every healthy sport is good for the nation—cricket, football, fencing, yachting, or any other healthy exercise and recreation; but if it had been the idea of lawyers that a gift for the encouragement of such exercises is therefore charitable, we should have heard of it before now. I do not attempt to draw the line. The authorities shew that sometimes a case is a little on one side of it, sometimes a little on the other; but I deal with the present case on the broad

(1) W. N. (1892) 140.
(2) 1 D. F. & J. 399.
(3) 13 Beav. 87.
(4) L. R. 4 Ch. 309.

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ground that I am not aware of any authority pointing to the conclusion that a gift for the encouragement of a mere sport can be supported as charitable.

LOPES L.J. It is most difficult to draw a line separating charitable gifts from gifts not charitable; and the only safe course is to say that a particular class of gifts do not come within the definition of a charitable gift. I am of opinion that a gift, the object of which is the encouragement of a mere sport or game primarily calculated to amuse individuals apart from the community at large, cannot upon the authorities be held to be charitable, though such sport or game is to some extent beneficial to the public. If we were to hold the gift before us to be charitable we should open a very wide door, for it would then be difficult to say that gifts for promoting bicycling, cricket, football, lawn-tennis, or any outdoor game, were not charitable, for they promote the health and bodily well-being of the community.

RIGBY L.J. It is probably impossible to define what is a charitable bequest; and it is certainly not advisable to attempt to do so. We must always go back to the analogy of the statute, which furnishes the only test that can be applied, to see whether a gift is charitable or not. If the present gift is to be supported as charitable, it must be on the ground that it is for a general public purpose. It is however plain from the words of the testator himself that he was not contemplating any such purpose. The Yacht Racing Association is a society of yacht-owners, the prizes are to be won by yacht-owners, and the testator tells us that his object in founding the prize is to encourage the sport of yacht-racing. There are many things which are laudable and useful to society which yet cannot be considered charitable, and this, in my opinion, is one of them.

Solicitors: *Lake & Lake; Neish, Howell & Macfarlane; Norman C. Barraclough; G. H. Barber & Son.*

H. C. J.

In re NOTTAGE. JONES *v.* PALMER (No. 2).

C. A. 1895 *July* 12.

[1895 N. 368.]

Will—Construction—Misdescription—Specific Gift.

A testator gave to each of his two nephews "500*l.* debenture stock or shares of the S. Company," to each of his three cousins "350 ordinary shares in the S. Company," to J. L. M. "250 fully-paid shares in the said company," and to C. "50 shares in the said company." He then gave "the pecuniary legacies following," giving a list of them. He then bequeathed to his trustees "5000*l.* debenture stock or shares of the S. Company, 350 ordinary shares in the same company, 1500*l.* debenture stock or shares in the B. Company, and 35 shares in the D. & H. Railway Company, upon trust to continue the same in their present state of investment," or to sell them and invest the proceeds, and to stand possessed of the said stocks and shares and the proceeds of sale and the investments representing the same upon the trusts therein mentioned. He gave his residuary estate to his trustees upon trust to convert it into money and pay his funeral and testamentary expenses and debts, and "pay or provide for the payment of the pecuniary legacies and sums hereinbefore bequeathed." And he declared that his trustees might postpone the conversion of his debentures or shares in the S. Company, or any other part of his personal estate, so long as they thought fit. The testator had debentures and ordinary shares in the S. Company and debentures in the B. Company. There was not in either company any debenture stock, nor any shares other than ordinary shares:—

Held, by Kekewich J., that the legacies were all general, and that the gifts of "debenture stock or shares" were invalid as being gifts of something which did not exist:

Held, on appeal, that by "debenture stock or shares" the testator intended to describe something different from ordinary shares, but as to the proper designation of which he was in doubt, and must be taken to have meant debentures:

Held, further, that the gift of 5000*l.* debenture stock or shares was clearly specific, as the testator spoke of its "present state of investment;" and that, looking at this and the other indications in the will that he was dealing with property which he had, the legacies of stock and shares must all be taken to be specific.

C. G. NOTTAGE, by will dated October 27, 1894, after appointing three persons to be his trustees and executors and bequeathing legacies to such of them as should prove his will, made various gifts of specific chattels. He then proceeded: "I give to each

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of my said nephews, C. E. Palmer and A. N. Palmer, 500*l.* debenture stock or shares of the London Stereoscopic and Photographic Company, Limited. I give to each of my cousins, B. Barraclough, K. Hinton, and E. Allen, 350 ordinary shares in the London Stereoscopic and Photographic Company, Limited. I give to J. L. Mitchell 250 fully-paid shares in the said company. I give to S. M. Clark 50 shares in the said company. I give the pecuniary legacies following (that is to say):" (here followed a number of gifts of sums of money) "I give to my trustees before named 5000*l.* debenture stock or shares of the London Stereoscopic and Photographic Company, Limited, 350 ordinary shares in the same company, 1500*l.* debenture stock or shares of the Barton Estate Company, Limited, and 35 shares in the Delaware and Hudson Canal and Railway Company, upon trust to continue the same in their present state of investment, or to sell same and invest the net proceeds of such sale in their names, with power to vary investments, and shall stand possessed of the said stocks and shares and the proceeds of the sale thereof, or the investments for the time being representing the same," in trust to pay the income to five persons, of whom Miss Bigwood was one, in the shares therein mentioned during their respective lives; and on the decease of each a corresponding share in the capital was to fall into the residue. He then bequeathed 2000*l.*, "out of such part of my estate as may legally be bequeathed for such a purpose" to the Yacht Racing Association of Great Britain on the trusts therein mentioned; to the National Lifeboat Institution 1500*l.*; to his sister, for the benefit of the Home for Girls, 500*l.*; to the Royal Alfred Aged Merchant Seamen's Institute 1000*l.*; to the Shipwrecked Fishermen and Mariners' Royal Benevolent Society 1000*l.*; and an additional 2000*l.* to the Royal Alfred, to be paid after his mother's death. He then gave 3000*l.* to trustees to be employed in establishing an institution for the purpose of instructing yachtsmen and other sailors in the science of navigation; and a further sum of 10,000*l.*, payable after the death of his mother, to be applied for the purposes of the institution. He then gave his residuary real and personal estate to his trustees upon trust to convert into money such parts of it as did not consist of money, and out of the proceeds and his

ready money pay his funeral and testamentary expenses and debts, "and pay, or provide for the payment, of the pecuniary legacies and sums hereinbefore bequeathed and the duty thereon," and invest the surplus as therein mentioned, and hold it on the trusts therein mentioned. "And I declare that my trustees may postpone the sale and conversion of my debentures or shares in the London Stereoscopic and Photographic Company, Limited, or any part thereof, or of any other part of my personal estate, for so long as they shall think fit."

The testator had at the time of his death 130 debentures of 50*l.* each issued by the London Stereoscopic and Photographic Company, and 3710 5*l.* shares in the same company. All the shares in the company were fully paid up. The company had also issued 100*l.* mortgage debentures, but the testator did not hold any of them. The company had no debenture stock, and no shares except ordinary shares.

The testator had debentures of the Barton Estate Company, but did not hold any shares in that company. In that company, also, there was no debenture stock.

The executors took out an originating summons to obtain the opinion of the Court—(1.) whether the legacies of stocks and shares given by the will (other than the legacy bequeathed to his executors in trust) were specific or general; (2.) whether that trust legacy was specific or general; (3.) if the legacies of stocks and shares, or any of them, were general legacies, how such legacies were to be paid or satisfied, having regard to the fact that it was uncertain whether the estate would be sufficient to pay in full all the legacies given by the testator.

Kekewich J. held that the legacies were general, not specific, and that, as there was nothing in either company answering the description of debenture stock or debenture shares, the testator in giving "debenture stock or shares" had given specified amounts of something which did not exist, and those gifts were ineffectual. His Lordship made an order declaring that on the true construction of the will—"(1.) the legacies of shares given by the said will of the said C. G. Nottage are general legacies, but that the legatees of 'debenture stock or shares' take nothing under the bequests to them; (2.) that the trust legacy bequeathed

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by the said will to the executors is a general legacy as regards the shares comprised therein, but void as regards the 5000*l.* debenture stock or shares of the London Stereoscopic and Photographic Company, Limited, and the 1500*l.* debenture stock or shares of the Barton Estate Company, Limited; (3.) That if the said testator's estate shall prove insufficient for the purpose of paying in full all the legacies bequeathed by his said will and the codicil thereto, the said legacies of shares ought to abate in proportion to the values thereof at the date of one year from the testator's death."

The nephew C. E. Palmer and Miss Bigwood severally appealed from the above declarations.

Crackanthorpe, Q.C., and *W. A. Peck*, for the appellants. The judge below has held that the gifts of "debenture stock or shares" fail because there is nothing to which that description is properly applicable; but, looking at what the testator held in the two companies, it is clear enough he meant debentures, though he has not used a proper description: *Door* v. *Geary* (1); *Trinder* v. *Trinder*. (2) Then we say that the legacies are specific. The gift of the 5000*l.* debenture stock or shares and other property to the trustees is manifestly specific, for the testator empowers the trustees to keep them in their "present state of investment," which shews he was dealing with property he then had in a state of investment, not with property to be bought. As to the gifts to the nephews there is more difficulty; but we contend that they also are specific. It is true that a gift of "1000*l.* Consols" is not held specific merely because the testator has Consols; but slight indications pointing at legacies being specific will suffice. Thus, in *Sleech* v. *Thorington* (3), gifts of stock legacies in general terms were held specific because the will contained a gift of the residue of the stock standing in the testatrix's name. Here there are various indications that the testator was dealing with property which he had. He expressly gives power to postpone the conversion of his debentures or shares in the Stereoscopic Company, and in dealing with the

(1) 1 Ves. Sen. 255. (2) L. R. 1 Eq. 695.
(3) 2 Ves. Sen. 560.

residue he directs his trustees to pay pecuniary legacies; but he makes no provision to enable the executors to buy stock legacies.

[RIGBY L.J. If not specific, are they not pecuniary?]

Yes; in a lawyer's point of view, but not in the view of the testator, who has spoken before of pecuniary legacies.

Pattullo, for the residuary legatees. In *In re Gray* (1), which was very similar to the present case, the gift was held general and failed; and in *In re Lane* (2) a gift of "my debentures" was held not to pass debenture stock into which the testator's debentures had been converted, debentures and debenture stock being different things. That the testator mentions his having property in the Stereoscopic Company is not a sufficient reason for holding that whenever he made a gift of property in that company he was meaning to deal with something which he had. He has, therefore, made a general gift of property answering a particular description; there is no property answering that description, and the gift fails.

Fawcus, for the trustees of the will.

LINDLEY L.J. I cannot agree with the conclusion of Kekewich J. that the appellants take nothing under the will.

The testator at the time of making his will and at the time of his death had 130 debentures of 50*l.* each in the Stereoscopic Company, and 3710 5*l.* shares fully paid up, and had nothing else in that company. There was no such thing as debenture stock in that company, still less anything that could answer the description of "debenture shares." There were two classes of debentures in the company, one called "mortgage debentures," having priority over the class of which the testator was a holder. In the Barton Estate Company the testator had debentures, but no shares.

In this state of things the testator gives to each of his two nephews (naming them) "500*l.* debenture stock or shares of the London Stereoscopic and Photographic Company, Limited." Then he gives to each of his cousins (naming them) "350 ordinary shares" in the same company. Then to another person

(1) 36 Ch. D. 205. (2) 14 Ch. D. 856.

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named "250 fully-paid shares in the said company." Then to another person "50 shares in the said company." Bearing in mind what he had, I think he meant by "debenture stock or shares" to give something which he did not know how to describe, but which he understood to be different from shares which he calls "ordinary shares" or "fully-paid shares," or simply "shares." Bearing in mind that he had debentures, I cannot come to the conclusion that there is such a defect of description as to destroy the gift, though the description is very imperfect and inaccurate.

As regards the Barton Estate Company, the testator gives to his trustees 5000*l.* debenture stock or shares in the Stereoscopic Company, 350 ordinary shares in the same company, and "1500*l.* debenture stock or shares of the Barton Estate Company, Limited." The testator had nothing but debentures in the Barton Estate Company, and he meant to give them under the inaccurate description of "debenture stock or shares." The remarks I have already made about the property in the Stereoscopic Company apply. The testator there contrasts "debenture stock or shares" with ordinary shares. When speaking of the Stereoscopic Company he meant by "debenture stock or shares" debentures as distinguished from ordinary shares; and when he used the same expression as to the Barton Estate Company he meant the same thing, i.e., debentures. So far, I think there is no real difficulty.

There remains the question whether the gifts are specific. As regards the debentures and shares comprised in the gift to the trustees, there is no reasonable doubt that the gift of them is specific, for the testator says that the trustees are to hold them "upon trust to continue the same in their present state of investment," or to sell them, which clearly points to something which he then had in some state of investment. As to the first bequests, those of 500*l.* each, there is more difficulty, for there is nothing in immediate connection with that clause to shew that the testator was dealing with something that he had. But looking at what he had, looking at the whole will, looking at the fact that he has disposed specifically of some of his debentures, and looking at the indication in the residuary clause that he

was dealing with the debentures which he had, I think we cannot go wrong in holding the first gift to the two nephews to be also specific—a gift of debentures which he had, and not a mere pecuniary bequest. I think that it was not a pecuniary bequest in the sense in which the testator understood the word, for after some gifts of stock and shares he gives a number of what he calls "pecuniary legacies," which are mere sums of money. Then, in the disposition of the residue, he directs his trustees to sell and convert into money his residuary property, and pay or provide for the payment of the "pecuniary legacies" thereinbefore bequeathed. That, I think, does not apply to the legacies of stock and shares, but to what he had called "pecuniary legacies;" and, coupling this with the power given to the trustees in the residuary clause to postpone the sale of his debentures or shares in the Stereoscopic Company, I think we ought to say that upon the true construction of this will the testator in each gift of debentures was giving part of the debentures which he held in the company.

I am of opinion, therefore, that the gifts of "debenture stock or shares," which form the subjects of these two appeals, are good specific gifts of debentures held by the testator in the companies.

LOPES L.J. I have difficulty in understanding how Kekewich J. came to the conclusion that nothing passed under the gifts of "debenture stock or shares." It appears to me that the testator was mixed in his mind as to the designations which he ought to apply to the interests which he had in the two companies, and that he did not know what to call them. He had in the Stereoscopic Company debentures and ordinary shares, and I have no doubt that by "debenture stock or shares" in that company he meant debentures. As to the Barton Estate Company the case is more clear: he had only debentures in that company, and he intended to give them under the description of "debenture stock or shares."

Then the question arises whether the gifts are specific or general. As to the debentures in the Barton Estate Company, the power to keep them in their present state of investment

C. A. 1895 *In re* NOTTAGE. JONES *v.* PALMER (No. 2). Lopes L J.

leaves no doubt that the gift of them is specific. As regards the gift of 500*l.* "debenture stock or shares" to each of the nephews there is more difficulty; but, having regard to the different parts of the will to which our attention has been called, I think that all the gifts of stock and shares are specific—that is, gifts of particular things which the testator possessed as distinguished from something to be provided out of his general estate by his trustees after his death. I am therefore of opinion that the appeals should be allowed.

RIGBY L.J. I am of the same opinion. In construing a will we must look at every part of it, and gather what light we can from one part for construing another part. Here the testator had debentures and shares in the Stereoscopic Company; he had debentures only in the Barton Estate Company. He appears in each case to be dealing with something which he possessed—describing something of which he did not know what the description ought to be. When he uses the expression "debenture stock or shares" I understand him as meaning "what I possess in the nature of debentures, whether properly called stock or shares, or whatever the proper description may be." You have got a long way towards a specific gift if you come to the conclusion that he is trying to describe something which he has. This is strengthened by other parts of the will. In another clause the testator gives property by a precisely similar description to trustees upon trust to continue the same in its present state of investment, or to sell the same; and further on he directs them to stand possessed of the said stocks and shares, and the proceeds of the sale thereof, or the investments for the time being representing the same, upon certain trusts. Here we have three several expressions which can only be explained on the supposition that he was making a specific gift of property which he had. We find that he gives a number of what he calls pecuniary legacies; and he then gives to the Yacht Association and to various charities gifts which he does not include in the term "pecuniary legacies," but which he afterwards refers to as "sums of money." It is true that if we were to hold the stock and share legacies to be general legacies they might perhaps in

legal intendment come under the meaning of "pecuniary legacies." But it is not a right way of construing a will to put a legal sense, of which the testator never heard or thought, on some of the words in the will, and write it into the will. When we come to the residuary clause we find that he only provides for the payment of "pecuniary legacies and sums of money"; and it would be a forced interpretation to hold that he meant to include in that the purchase of stock legacies. Taking all the clauses of the will together, I think it would be fantastic to suppose that in dealing with "debenture stock or shares" he meant, not that the legatees should take them out of "debenture stock and shares" which he had got, but that they were to have them purchased for them. The case is totally different from that of a testator saying, "I give to A. B. 1000*l.* Consols." Consols are a common form of investment, and in such a gift there is nothing to lead to the conclusion that he meant the gift to be of part of the Consols which he had. But when a man has different kinds of investments, and by his will deals with them all, dealing with some of them in such a way as to make it absolutely clear that he intended specific gifts, and with regard to all there are expressions in the will which agree better with the hypothesis that the gifts are specific than that they are general, I think we may safely conclude that the gifts of investments of particular descriptions are specific.

Solicitors: *Norman C. Barraclough; Neish, Howell & Macfarlane.*

H. C. J.

C. A.
1895
Aug. 3, 9.

In re BROWN (A LUNATIC).

Lunatic—Victoria, Colony of—Person in Victoria found Lunatic by Inquisition—English Stocks in Lunatic's Name—Transfer to Master in Lunacy in Victoria—Jurisdiction—Property of Lunatic "vested" in Master—Lunacy Act, 1890 (53 & 54 *Vict. c.* 5), *s.* 134—*Victoria Lunacy Act*, 1890.

Under s. 134 of the Lunacy Act, 1890, the Court in Lunacy has jurisdiction to order funds in this country standing in the name of a person resident abroad, and found lunatic by a foreign or Colonial Court, to be transferred to the committee, curator or other person duly appointed by that Court to manage the lunatic's personal estate, although such personal estate is not actually "vested" in such committee, curator or other person according to the law of this country.

A lady residing in the colony of Victoria was declared lunatic by the Supreme Court of the colony sitting in Lunacy, and the Master in Lunacy in the colony was appointed to manage her property, which consisted of English stocks standing in her name:—

Held, that, under s. 134 of the Lunacy Act, 1890, the Court in Lunacy in this country had jurisdiction to order a transfer of the stocks to the Master in Lunacy in Victoria, and the Court being satisfied that all the stocks were required for the maintenance and support of the lunatic, made the order accordingly, prefaced with a statement that the personal estate of the lunatic was "vested" in the master within the meaning of that section.

"Vested," in s. 134, includes the right to obtain and deal with, without being actual owner of, the lunatic's personal estate.

In re Barlow's Will (36 Ch. D. 287) considered.

LUNACY PETITION.

By the report, dated September 14, 1894, of Master Webb, Master in Equity and Master in Lunacy of the colony of Victoria, made on an inquisition directed by the Supreme Court of Victoria, sitting in Lunacy, on a petition under the Lunacy Act, 1890, of the colony (Statutes of Victoria, 54 Vict. No. 1113), Miss Gertrude Emily Brown, a lunatic patient and an inmate of the Asylum for the Insane at Kew in the colony, was found to be of unsound mind and incapable of managing herself or her affairs; and by an order of the said Court of September 27, 1894, Master Webb was appointed guardian of her person and estate, and the care and management of her property were remitted to him. No other person than the master was appointed committee of the lunatic's property. The lunatic was entitled to the

following property in England, namely, 732*l.* 9*s.* 2*d.* Consolidated Ordinary Stock of the Midland Railway Company, 104*l.* like stock of the London and North Western Railway Company, and 260*l.* $2\frac{3}{4}$ per cent. Consols. These several securities were standing in the sole name of the lunatic, the income from the whole amounting to a little over 50*l.* a year.

Master Webb then appointed an attorney in this country to recover these securities and any other property of the lunatic in the United Kingdom, and, by his attorney, presented this petition, intituled under the English Lunacy Acts, 1890 and 1891, asking, pursuant to s. 134 of the Act of 1890 (1), that some fit person or persons might be ordered to transfer the securities into the name of the petitioner, the master, or of his attorney, and to receive and pay the dividends thereof respectively to the petitioner or his attorney.

Minutes of an order on the petition had been drawn up by the Master in Lunacy in this country for transferring the stock and paying the dividends to the attorney; but the judge in Lunacy, being in doubt as to the jurisdiction, having regard to the decision in *In re Barlow's Will* (2), ordered the petition to be placed in the paper for argument.

The petition was argued on August 3, 1895.

The Lunacy Act, 1890, of the colony of Victoria (Statutes of Victoria, 54 Vict. No. 1113) defines (s. 3) a "lunatic" as a person of unsound mind and incapable of managing himself or his affairs, and whether found lunatic by inquisition or not; and a "lunatic patient" and "patient" as a person received into and detained in any asylum, hospital or licensed house under the provisions of the Act.

Sect. 124 provides that the Supreme Court of the Colony and

(1) Sect. 134 of the English Lunacy Act, 1890 (53 & 54 Vict. c. 5), is as follows: "Where any stock is standing in the name of or vested in a person residing out of the jurisdiction of the High Court, the judge in Lunacy, upon proof to his satisfaction that the person has been declared lunatic, and that his personal estate has been vested in a person appointed for the management thereof, according to the law of the place where he is residing, may order some fit person to make such transfer of the stock or any part thereof to or into the name of the person so appointed or otherwise, and also to receive and pay over the dividends thereof, as the judge thinks fit."

(2) 36 Ch. D. 287.

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the Master in Lunacy (the Master in Equity for the time being of the Court being Master in Lunacy) may, after the return of an inquisition, make such orders and do such acts relative to the custody of the person, the object of the inquisition, and the management of his estates, as it or he shall think proper.

By s. 130, when any person has been found insane under an inquisition, the Court may "appoint the Master in Lunacy or any other person or persons a committee of the insane person's estate or person or both, and may give such orders in respect of the management of his estate or person, not inconsistent with the provisions of this Act, as it may deem expedient, and the committee so appointed shall have the same duties, powers and liabilities as if he were the committee of a person declared insane under this Act."

By s. 131, the Master in Lunacy is empowered and required to undertake the general care, protection and management of the estates of all lunatics and lunatic patients in Victoria; and "it shall be his duty to supervise and to enforce the performance of the obligations and duties of all committees of lunatics heretofore or hereafter to be appointed, and to take possession and care of, recover, collect, preserve and administer, under the provisions of or authorized by this Act, the property and estates of all lunatic patients."

By s. 182 the master has power, with respect to the estates of patients, to (amongst other things) receive and recover moneys due, demise lands, sell or convert into money any real or personal property, and surrender any lease, receive all rents, income and profits of real or personal property, and settle or compromise demands. Under s. 190 the master is at liberty to apply the money coming to his hands in respect of any estate in paying the debts of, and maintaining, the patient and his family, and in payment of the costs of management of his estate; and to invest moneys not presently required for those purposes, in the name of the treasurer, in Victorian Government stock; and the treasurer may from time to time, at the request of the master, buy or sell any of the said stock or transfer it to the patient on his discharge or to his legal personal representative on his death.

Sect. 229 is as follows: "Where any stock shall be standing in the name of or shall be vested in a lunatic beneficially entitled thereto, or shall be standing in the name of or vested in a committee of the estate of a lunatic in trust for the lunatic or as part of his property, and the committee shall die intestate or himself become lunatic or be out of the jurisdiction of or not amenable to the process of the Court, or it shall be uncertain whether the committee be living or dead, or he shall neglect or refuse to transfer the stock and to receive and pay over the dividends thereof to a new committee or as he shall direct for the space of fourteen days next after a request in writing for that purpose made by a new committee, then the Court "—that is, the Supreme Court of Victoria—"may order some fit person to transfer the stock to or into the name of a new committee or otherwise, and also to receive and pay over the dividends thereof or such sum or sums of money and in such manner as the Court may order."

S. W. Strickland, for the petitioner. The general scheme of the Victorian Act appears to be that the Master in Lunacy of Victoria should be and act as the lunatic's committee; and if so then the lunatic's property should be transferred to him.

[LINDLEY L.J. The master is merely a receiver and manager, with power to act as such until a committee is appointed. What do you say to *In re Barlow's Will* (1)?]

That case does not apply to the present, for there the patient was not found lunatic by inquisition. Here the patient is a lunatic so found, and although there is no provision in the Act that the property of the lunatic shall be vested in the master, yet the duties he has to perform are such that it must be contemplated that he should have the control of the property.

LINDLEY L.J. The Act is so new to us that we will look at it. I understand that the only distinction between this case and *In re Barlow's Will* (1) is that in the latter case the patient was not found lunatic, whereas here she has been, so that this case is a step further. We will consider it.

Cur. adv. vult.

(1) 36 Ch. D. 287.

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In re BROWN (A LUNATIC).

Aug. 9. The judgment of the Court (Lindley, Lopes and Rigby L.JJ.) was delivered by

LINDLEY L.J. The question which has to be decided in this case is whether the Court has jurisdiction under s. 134 of the Lunacy Act, 1890, to order certain stocks standing in the name of the lunatic to be transferred to a Master in Lunacy in the colony of Victoria, to be applied by him in the maintenance of the lunatic.

Sect. 134 runs thus: [His Lordship read the section, and continued:—]

The lunatic is residing out of the jurisdiction of the High Court, and has been declared lunatic, and the master of the Supreme Court of Victoria has been appointed to manage the lunatic's personal estate. So far there is no difficulty. But such personal estate is not vested in the colonial master in the sense of being divested from the lunatic, nor so as to pass to the master's successor in office, or to his personal representatives, in trust for the lunatic, in the case of the master's death.

Sect. 134, it will be observed, uses the word "vested" with reference to the laws of the country where the lunatic is and has been declared lunatic, and if s. 134 only applies where the personal property of a person declared lunatic by a foreign or colonial Court is vested in the strict technical sense and according to the law of England, the section will not only be inapplicable to this case but it will seldom, if ever, be applicable at all. It very rarely happens, if indeed it ever happens, that foreign or colonial Courts divest the personal estates of lunatics subject to their jurisdiction and vest such property in committees, curators or other officials. What is usually done in the colonies and in foreign countries is very much the same as we do ourselves. We appoint a committee with power to obtain possession of the lunatic's property, and, if necessary, to sue for and recover it by proper process, and with large powers of disposition and management for the benefit of the lunatic. But we do not vest the lunatic's property in the committee in the strict sense of the word "vest." Neither do colonial or foreign courts. Unless, therefore, the word "vested" in s. 134 is construed in a wide sense so as to include the right to obtain and deal with, without

becoming actual legal owner of, the lunatic's property, the section will be practically useless. The object, however, of the section is obviously to enable the judge in Lunacy to hand over to committees, curators and other persons properly appointed by foreign tribunals, the personal property of persons declared lunatics and subject to their jurisdiction; and the section ought to be construed so as to effectuate and not so as to defeat this object.

If now we turn to previous decisions, we find that orders have been made transferring stocks, funds and securities to curators of lunatics resident out of England, namely, in France, Holland and Scotland, although the property of such lunatics was not vested in their curators in the strict technical sense of that expression. The following are the cases referred to, arranged in order of date: *In re Stark* (1), Scottish; *In re Elias* (2), Dutch; *Scott* v. *Bentley* (3), Scottish; *In re Garnier* (4), French; *In re Mitchell* (5), Scottish. Of these cases *Scott* v. *Bentley* (3) is the most instructive, as the rights and powers of Scottish curators were there fully argued and carefully considered by Sir W. Page Wood. In *In re Stark* (1), and also in *In re Garnier* (4), the dividends only were ordered to be paid to the curator, the Court considering that it had a discretion in the matter, and not being satisfied that any capital was wanted for any immediate purpose. In *In re Elias* (2), however, and again in *In re Mitchell* (5), the capital was transferred to the curator and no security was required.

In *Scott* v. *Bentley* (3) and in *In re Garnier* (4) the stock was in Court, and those cases did not therefore turn on the construction of the Lunacy Acts but on the rights and powers of Scottish and French curators respectively.

In *In re Barlow's Will* (6) the Master in Lunacy, appointed by the Supreme Court of New South Wales under the New South Wales Lunacy Act, applied for a transfer to him of a sum of 2249*l.* 18*s.* New 3 per cent. Annuities belonging to the lunatic and paid into court under the Trustee Relief Act. The lunatic there was not judicially declared lunatic, and the Court held,

(1) 2 Mac. & G. 174.
(2) 3 Mac. & G. 234.
(3) 1 K. & J. 281.
(4) L. R. 13 Eq. 532.
(5) 17 Ch. D. 515.
(6) 36 Ch. D. 287.

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first, that the colonial master had no absolute right to have the whole sum transferred to him, but an order was nevertheless made for the payment to him of part of the capital, namely, 803*l.*, and of the future dividends. The lunatic in that case was only a patient not judicially declared to be insane, and the Court felt considerable difficulty in making any order at all for payment to the colonial master. But it is obvious from the judgments that, if the lunatic had been judicially declared lunatic so that his legal status had been altered, the Court would not have felt any difficulty in making any order which the Court thought proper for transferring the annuities to the colonial master. That case, however, did not turn on the Lunacy Acts of this country.

So far as authorities are concerned, therefore, *In re Elias* (1) and *In re Mitchell* (2) are in favour of the Court having jurisdiction to order a transfer of the lunatic's property in the funds of this Government to a properly appointed curator although the lunatic's personal estate is not actually vested in him according to the law of this country. The colonial Act in this case clearly gives the master all the powers necessary to enable him to obtain and dispose of the stocks which we are asked to order to be transferred to him; and as we are satisfied that the whole is wanted for the maintenance and support of the lunatic, the order prepared by the master and submitted to us for approval may be made. Whether, if the whole were not wanted, the colonial master would be entitled to have the whole transferred to him as of right, is another matter and need not be decided. Sect. 134 of the Lunacy Act, 1890, seems to give the judge in Lunacy a discretion.

In order to make the order right on the face of it, we propose to state in it that the personal estate of the lunatic is vested in the colonial master within the meaning of s. 134 of the Lunacy Act, 1890.

Solicitors: *Roy & Cartwright.*

(1) 3 Mac. & G. 234. (2) 17 Ch. D. 515.

G. I. F. C.

In re LONDON AND GENERAL BANK (No. 2).

C. A.
1895
June 17, 18, 19, 20, 21; Aug. 6.

Banking Company—Winding-up—Misfeasance of Officers—Duty of Auditors in framing their Certificate—Companies Act, 1879 (42 & 43 *Vict. c.* 76), *s.* 7—*Companies* (*Winding-up*) *Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 10.

Although it is not the duty of the auditors of a company, appointed under the Companies Act, 1879, to consider whether its business is prudently or imprudently conducted, it is their duty to consider and report to the shareholders whether the balance-sheet exhibits a correct view of the state of the company's affairs, and the true financial position of the company at the time of the audit. They must ascertain this by examining the books of the company, and must take reasonable care that what they certify as to the company's financial position is true. And except in very special cases it is their duty to place before the shareholders the necessary information as to the true financial position of the company, and not merely to indicate the means of acquiring it.

An auditor presented a confidential report to the directors calling their attention to the insufficiency of the securities on which the capital of the company was invested, and the difficulty of realizing them, but in his report to the shareholders merely stated that the value of the assets was dependent on realization, and in the result the shareholders were deceived as to the condition of the company, and a dividend was declared out of capital and not out of income:—

Held (affirming the decision of Vaughan Williams J.) that the auditor had been guilty of misfeasance under s. 10 of the Companies (Winding-up) Act, 1890, and was liable to make good the amount of the dividend paid.

THIS was an appeal by Mr. Theobald, one of the auditors of the London and General Bank, Limited, from a judgment of Vaughan Williams J., by which he was declared liable for the payment by the company of certain dividends out of capital.

The company was a banking company registered as a limited company after the passing of the Companies Act, 1879. The 7th section of that Act by sub-s. 1 renders it necessary that the accounts of any banking company registered after that date should be audited by auditors appointed annually by the company.

By sub-s. 5, "Every auditor shall have a list delivered to him of all books kept by the company, and shall at all reasonable times have access to the books and accounts of the company; and any auditor may, in relation to such books and

C. A. 1895 *In re* London and General Bank (No. 2).

accounts, examine the directors or any other officer of the company." By sub-s. 6, "The auditor or auditors shall make a report to the members on the accounts examined by him or them, and on every balance-sheet laid before the company in general meeting during his or their tenure of office; and in every such report shall state whether, in his or their opinion, the balance-sheet referred to in the report is a full and fair balance-sheet properly drawn up, so as to exhibit a true and correct view of the state of the company's affairs, as shewn by the books of the company."

The articles of association were drawn in conformity with the Act. They contained the following provisions, which were specially referred to in the argument:—

Clause 106: "At every ordinary meeting the directors shall lay before the meeting a balance-sheet shewing the financial state of the company for the previous financial year, duly audited, and every such balance-sheet shall be accompanied by a report of the directors as to the state and condition of the company, and as to the amount which they recommend to be paid out of the profits by way of dividend or bonus to the shareholders, after allowing for any interim dividend which the directors may have declared, and any sum which they may have set aside under article 116 hereof."

Clause 107: "The accounts of the company shall be from time to time examined, and the correctness of the statements shall be from time to time ascertained, by two or more auditors, in accordance with these presents."

Clause 109 provided that (with certain specified exceptions) all auditors should be appointed at the ordinary meeting of the company in each year by the shareholders present thereat.

By clause 112 the remuneration of the auditors was to be determined at the ordinary general meeting of the shareholders; and by clause 114 the auditors were to be supplied with copies of the statement of accounts intended to be laid before the meeting, and it should be their duty to examine the same, with the accounts and vouchers relating thereto.

The company was formed for the purpose of making loans to and otherwise assisting certain building companies called the

"Balfour" group of companies, and its profits consisted mainly of interest and commission payable by them. The interest and dividends were generally debited to the accounts of the borrowing companies, and the accounts of those companies were in most cases kept in credit by fresh loans from the banking company, and the interest and charges paid out of money lent directly or indirectly by the banking company. It was alleged that the balance-sheets certified by the auditors and presented to the shareholders had been so drawn for some years that they did not shew the true position of the bank, and that the dividends were declared and paid out of capital and not out of profits.

A petition was presented for winding up the company, and an order for winding up was made, and the official liquidator took out a summons under the Companies (Winding-up) Act, 1890, s. 10, against Messrs. Walton, Layton, and Pattison, directors of the company, and Messrs. Theobald and Timms, the auditors, asking that they might be declared liable to make good the sum paid as half-yearly dividends for certain years, on the ground that they had been paid out of capital and not out of income.

Vaughan Williams J., before whom the summons was heard, declared that the dividends for the years 1890 and 1891 were improperly declared and paid out of capital, and that the directors and auditors were jointly and severally liable to pay to the official liquidator of the bank two sums of 5946*l.* 12*s.* and 8486*l.* 11*s.*, being respectively the amounts of the dividends paid in those two years. The three directors and Mr. Theobald, one of the auditors, appealed from this decision. The appeal of Mr. Theobald, which was the only appeal prosecuted to a hearing, came on before the Court of Appeal on April 24, 1895, and their Lordships on April 30 gave judgment on the preliminary point whether the auditors of a banking company were "officers" of the company within the 10th section of the Companies (Winding-up) Act, 1890, holding that the auditors were "officers" within the meaning of the Act, and if guilty of misfeasance might be made liable in proceedings under that section. (1)

The appeal of Mr. Theobald then came on to be argued on

(1) Ante, p. 166.

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the merits. The evidence adduced was extremely voluminous, relating to the financial position of the bank during several years and the manner in which Mr. Theobald and his fellow auditor, Mr. Timms, had performed their duty as auditors.

It appeared from the evidence that the greater part of the capital of the bank had been for some years past advanced to four of the "Balfour" companies, namely, the Liberator Society, the Lands Allotment Company, the House and Land Company, and the Building Estates Company, and a few special customers, of whom Wilkinson and Benham were particularly referred to in the argument, on securities which were very insufficient and difficult of realization, and that the real value of the securities did not justify the dividends paid by the bank to their shareholders. Messrs. Theobald and Timms had been auditors of the company since 1882, and they had in their reports to the directors repeatedly called their attention to the precarious financial position of the bank, which became more evident year by year. Their reports to the shareholders took the form of a certificate or memorandum written on the balance-sheet for the year; and in the earlier years contained a statement to the effect that in their opinion the balance-sheet exhibited a true and correct view of the position of the bank. In the later reports that statement was omitted.

As the auditor was held liable in respect of his certificate on the balance-sheet of 1891 only, it will be sufficient to refer particularly to his conduct on that occasion. The report to the directors was made on February 3, 1892. In the balance-sheet for the year 1891, to which that report referred, the most important asset was 346,975*l.*, put down as "Loans to customers and other securities," and the report contained a detailed statement calling the directors' serious attention to the unsatisfactory nature of these loans and securities, and the difficulty of their realization. The report contained the following sentences:

The gravity of the situation is enhanced by the fact, as we believe it to be, that the board is in many cases powerless to decline further help because they are powerless to realize. We beg also respectfully to point out that the quarters from which the bank obtains by far the larger proportion of its business are

such that the constitution of the board must make it difficult, if not impossible, to obtain a sufficiently independent opinion upon many vital questions which have to be decided in the management." And they concluded the report with this observation: "We cannot conclude without expressing our opinion unhesitatingly that no dividend should be paid this year." This sentence, however, the auditors were persuaded by the chairman, Mr. Jabez Balfour, to strike out before the report was officially laid before the directors. The report contained this postscript: "We do not wish it to be understood that we consider all the accounts in the schedule unsecured, but as a whole the capital therein represented is locked up." The certificate signed by the auditors and laid before the shareholders at their annual meeting was as follows: "We have examined the above balance-sheet and compared it with the books of the company; and we certify that it is a correct summary of the accounts therein recorded. The value of the assets as shewn on the balance-sheet is dependent upon realization." The report as originally drawn contained this additional sentence: "And on this point we have reported specifically to the board"; but the sentence was withdrawn, before the report was laid before the meeting, at the request of the chairman, Mr. J. Balfour, who promised to mention such report in his speech to the shareholders. Mr. Balfour did refer to the report, but not in such a way as to call the attention of the meeting specially to it, and eventually on his motion a dividend of 7 per cent. was declared.

Cohen, Q.C., *Cozens-Hardy, Q.C.*, and *Whinney*, for the appellant. It has been decided at the previous hearing that the auditor of a bank is an "officer of the company" within the meaning of the Companies (Winding-up) Act, 1890 (53 & 54 Vict. c. 63), s. 10, so as to be accountable for the misapplication of any moneys or property of the company, or for misfeasance or breach of trust in relation to the company. But this is the first time that any attempt has ever been made to fix an auditor with such liability. It has never yet been decided what is the exact character, nature, and extent of the duties of an auditor, and such authorities as have any bearing are not

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conclusive. At all events, he is not an officer of the company in the sense that a director, manager, or liquidator is. His position is radically different in every respect. He is not a permanent officer. He is elected ad interim for a limited period at a fixed fee, and he goes out of office at the end of that period. The directors are always on the spot, and are the managers of the concern and quasi trustees for the company. The auditor is not appointed to manage the concern, but to see that the balance-sheet represents the state of the books. His duty is to examine the books, and he must accept those books as he finds them. He ascertains the cash at the bank, he asks for the vouchers, and sees that the securities are there. But it is a fallacy to contend that he is to ascertain whether too much credit has been given to any one, or that he is to judge or check the directors. Mr. Theobald described to the learned judge the manner in which he performed his duties, and we contend that he went beyond them. In previous years he advised the directors that the bank were holding too many of the securities of "the Balfour Group." In 1891 he found those securities increased to upwards of 308,000*l.*, and gave his opinion that they could not be realized to cover that amount. At that time Jabez Balfour was considered a man of high standing, great wealth, and large resources, and the Liberator Society was considered one of the safest societies in England, and it was not the province of the auditors to estimate accurately the value of the securities in which the capital of the company was invested. The official liquidator has had all the books of all the Balfour Companies before him, and has had opportunities of unravelling their proceedings never possible to Mr. Theobald. He performed his duty in warning the directors; it was no part of his duty to certify to the shareholders the value of the securities. He was only required to certify that the balance-sheet was correctly drawn up from the books of the company. But they did in fact warn the shareholders of the necessity of inquiring into the sufficiency of the securities by appending a note to their report to the effect that the value of the securities depended on their realization. This was an unusual note, and was sufficient to put the shareholders on inquiry. It is not correct to say that the dividend was declared

out of capital. If the assets had been realized there would have been sufficient profit to pay it. But it was not the duty of the auditors to advise as to declaration of a dividend, that was entirely within the discretion of the directors; and if the auditors have in fact failed in their duty in placing the true state of the company before the shareholders, the declaration of the dividend was not the direct consequence of that failure of duty, and they cannot be held responsible for it: *Bentinck* v. *Fenn.* (1) At the worst, the conduct of the auditors was only negligence and not misfeasance for which they can be made liable on this summons. [They referred to 42 & 43 Vict. c. 76, s. 7, and to the following clauses of the articles of association of the company, 98, 99, 103, 107, 115, 116, 117, 121.]

Finlay, Q.C., *E. S. Ford*, and *Muir Mackenzie*, for the official liquidator. The duty of the auditors is plainly shewn by the 7th section of the Act of 1879, and the clauses in the articles which have been referred to. They are not only to verify the correctness of the entries in the books and the items in the balance-sheet; they are "to state whether in their opinion the balance-sheet is a full and fair balance-sheet properly drawn up so as to exhibit a true and correct view of the company's affairs as shewn by the books of the company." Theobald took a correct view of his duty in preparing his report to the directors, and warned them of the real position of the company; but unfortunately he gave way to the managing director, and did not make an equally faithful report to the shareholders, which he was required to do by the statute. It is true that it was not his duty to advise the shareholders as to the amount of the dividend; but by omitting, at the request of J. Balfour, to refer to the special report to the directors, and by standing by while the shareholders were deceived by the directors as to the condition of the company, he made himself an accomplice of the directors in passing the dividend. The duty of auditors is to protect the shareholders against the directors, if they are misapplying the funds of the company. It is contended that the passing of the dividend was the direct result, not of the conduct of the auditors, but of the recommendation of the directors. But there can be no

(1) 12 App. Cas. 652.

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doubt that if the auditors had presented a faithful report to the shareholders no dividend would have been declared for 1891, and in questions of tort like the present there is no distinction between the proximate and remote causes of damage: *The Bernina* (1); *Leeds Estate Building and Investment Co.* v. *Shepherd.* (2) The whole system upon which the company had been carried on for some years was contrary to its constitution. It was intended to afford assistance to the members of the Balfour group of building societies rather than to finance the societies; and the system pursued of giving fresh loans to the societies towards the end of each year, so as to put them in credit when the accounts were closed, was a most vicious system, and was carried on for the purpose of deceiving the shareholders. The auditors knew of these irregular practices, and by concealing them from the members contributed to the passing of the fraudulent dividend. They ought, therefore, justly to be held liable.

Cohen, Q.C., in reply.

Cur. adv. vult.

Aug. 6. Lindley L.J. read the following judgment, in which Lopes L.J. concurred:—This is an appeal by Mr. Theobald, one of the auditors of the above bank, which is being wound up, against an order made by Vaughan Williams J. under s. 10 of the Companies (Winding-up) Act, 1890. By this order Mr. Theobald and the directors of the bank are declared jointly and severally liable to pay to the official receiver, as liquidator of the company, two sums of 5946*l.* 12*s.* and 8486*l.* 11*s.*, being respectively the amounts of dividends declared and paid by the bank for the years 1890 and 1891. The grounds on which this order was made on Mr. Theobald are that these dividends were paid out of capital, and that such payment was made pursuant to resolutions of the shareholders based upon recommendations of the directors of the bank and upon balance-sheets prepared and certified by Mr. Theobald, and which did not truly represent the financial position of the company. Mr. Theobald's appeal was supported by arguments to this effect: (1.) That Mr. Theobald was not an "officer" of the company within the meaning

(1) 12 P. D. 58, 61; 13 App. Cas. 1. (2) 36 Ch. D. 787.

of s. 10 of the Companies (Winding-up) Act of 1890; (2.) that the balance-sheets and certificates given by Mr. Theobald were in accordance with the books of the bank, and that his duty as auditor was confined to framing balance-sheets which shewed the position of the bank as disclosed by its books; (3.) that the dividends in question were not really paid out of capital, and that, however improvident and reckless it may have been to pay them, Mr. Theobald as auditor is not legally responsible for such payment; (4.) that, even if Mr. Theobald as auditor failed adequately to discharge his duty, and even if the dividends were paid out of capital, his failure to discharge his duty was the remote, and not the proximate, cause of the wrongful payment of the dividends, and that he consequently is not legally liable to make good the amount so paid; (5.) that at any rate the order is wrong in declaring him liable jointly and severally with the directors to repay the dividends in question. The first of these contentions was argued and decided last April (1), and this Court then held that an auditor of a banking company, governed by the Companies Act, 1879, and by such articles as regulated the present company, was an "officer" of the company within the meaning of s. 10 of the Companies (Winding-up) Act of 1890, and was liable to have proceedings taken against him under that section. This point having been then decided was, of course, not again raised, and nothing further need be said about it. It remains, however, to consider what the duties of an auditor are as respects banking companies governed by the Companies Act, 1879, and by such articles as regulated this particular company. It will be convenient to do this before examining the facts relied upon by the liquidator as rendering Mr. Theobald liable to make good the dividends which he has been ordered to pay. The duties of the auditors in this case were governed by s. 7 of the Companies Act, 1879, and by clauses 106, 107, 109, and 114 of the articles of association. [His Lordship read sub-ss. 1, 5, and 6 of s. 7 of 42 & 43 Vict. c. 76, and clauses 106, 107, 109, and 114 of the articles of association, which are stated above, and continued:—]

These are the enactments and regulations which bear directly

(1) Ante, p. 166.

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on the duties of the auditors, and although clauses 107 and 114 are in terms more explicit than s. 7 of the statute as regards the duty of the auditors to examine and ascertain the correctness of the statements laid before them, and of the accounts laid before the shareholders, yet it is tolerably plain from the language of s. 7, sub-s. 5, that the articles add little, if anything, to the duty imposed on the auditors by the statute alone. In connection with these articles, and in order to save repetition, it should be stated that by the articles of this bank it is the duty of the directors, and not of the auditors, to recommend to the shareholders the amounts to be appropriated for dividends (clause 98), and it is the duty of the directors to have proper accounts kept, so as to shew the true state and condition of the company (clause 103). Lastly, it is for the shareholders, but only on the recommendation of the directors, to declare a dividend (clause 115). It is impossible to read s. 7 of the Companies Act, 1879, without being struck with the importance of the enactment that the auditors are to be appointed by the shareholders, and are to report to them directly, and not to or through the directors. The object of this enactment is obvious. It evidently is to secure to the shareholders independent and reliable information respecting the true financial position of the company at the time of the audit. The articles of this particular company are even more explicit on this point than the statute itself, and remove any possible ambiguity to which the language of the statute taken alone may be open if very narrowly criticised. It is no part of an auditor's duty to give advice, either to directors or shareholders, as to what they ought to do. An auditor has nothing to do with the prudence or imprudence of making loans with or without security. It is nothing to him whether the business of a company is being conducted prudently or imprudently, profitably or unprofitably. It is nothing to him whether dividends are properly or improperly declared, provided he discharges his own duty to the shareholders. His business is to ascertain and state the true financial position of the company at the time of the audit, and his duty is confined to that. But then comes the question, How is he to ascertain that position? The answer is, By examining the books of the company. But

he does not discharge his duty by doing this without inquiry and without taking any trouble to see that the books themselves shew the company's true position. He must take reasonable care to ascertain that they do so. Unless he does this his audit would be worse than an idle farce. Assuming the books to be so kept as to shew the true position of a company, the auditor has to frame a balance-sheet shewing that position according to the books and to certify that the balance-sheet presented is correct in that sense. But his first duty is to examine the books, not merely for the purpose of ascertaining what they do shew, but also for the purpose of satisfying himself that they shew the true financial position of the company. This is quite in accordance with the decision of Stirling J. in *Leeds Estate Building and Investment Co.* v. *Shepherd.* (1) An auditor, however, is not bound to do more than exercise reasonable care and skill in making inquiries and investigations. He is not an insurer; he does not guarantee that the books do correctly shew the true position of the company's affairs; he does not even guarantee that his balance-sheet is accurate according to the books of the company. If he did, he would be responsible for error on his part, even if he were himself deceived without any want of reasonable care on his part, say, by the fraudulent concealment of a book from him. His obligation is not so onerous as this. Such I take to be the duty of the auditor: he must be honest—i.e., he must not certify what he does not believe to be true, and he must take reasonable care and skill before he believes that what he certifies is true. What is reasonable care in any particular case must depend upon the circumstances of that case. Where there is nothing to excite suspicion very little inquiry will be reasonably sufficient, and in practice I believe business men select a few cases at haphazard, see that they are right, and assume that others like them are correct also. Where suspicion is aroused more care is obviously necessary; but, still, an auditor is not bound to exercise more than reasonable care and skill, even in a case of suspicion, and he is perfectly justified in acting on the opinion of an expert where special knowledge is required. Mr. Theobald's evidence satisfies me that he took the same view as myself of his

(1) 36 Ch. D. 802.

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duty in investigating the company's books and preparing his balance-sheet. He did not content himself with making his balance-sheet from the books without troubling himself about the truth of what they shewed. He checked the cash, examined vouchers for payments, saw that the bills and securities entered in the books were held by the bank, took reasonable care to ascertain their value, and in one case obtained a solicitor's opinion on the validity of an equitable charge. I see no trace whatever of any failure by him in the performance of this part of his duty. It is satisfactory to find that the legal standard of duty is not too high for business purposes, and is recognised as correct by business men. The balance-sheet and certificate of February, 1892 (i.e., for the year 1891), was accompanied by a report to the directors of the bank. Taking the balance-sheet, the certificate, and report together, Mr. Theobald stated to the directors the true financial position of the bank, and if this report had been laid before the shareholders Mr. Theobald would have completely discharged his duty to them. Unfortunately, however, this report was not laid before the shareholders, and it becomes necessary to consider the legal consequences to Mr. Theobald of this circumstance. A person whose duty it is to convey information to others does not discharge that duty by simply giving them so much information as is calculated to induce them, or some of them, to ask for more. Information and means of information are by no means equivalent terms. Still, there may be circumstances under which information given in the shape of a printed document circulated amongst a large body of shareholders would, by its consequent publicity, be very injurious to their interests, and in such a case I am not prepared to say that an auditor would fail to discharge his duty if, instead of publishing his report in such a way as to insure publicity, he made a confidential report to the shareholders and invited their attention to it and told them where they could see it. The auditor is to make a report to the shareholders, but the mode of doing so and the form of the report are not prescribed. If, therefore, Mr. Theobald had laid before the shareholders the balance-sheet and profit and loss account, accompanied by a certificate in the form in which he first prepared

it, he would perhaps have done enough under the peculiar circumstances of this case. I feel, however, the great danger of acting on such a principle; and in order not to be misunderstood I will add that an auditor who gives shareholders means of information instead of information respecting a company's financial position does so at his peril and runs the very serious risk of being held judicially to have failed to discharge his duty.

In this case I have no hesitation in saying that Mr. Theobald did fail to discharge his duty to the shareholders in certifying and laying before them the balance-sheet of February, 1892, without any reference to the report which he laid before the directors and with no other warning than is conveyed by the words, "The value of the assets as shewn on the balance-sheet is dependent upon realization." The most important asset on that balance-sheet is put down as "Loans to customers and other securities," 346,975*l.*, and on these a full and detailed report was made to the directors shewing the very unsatisfactory state of these loans and securities, and it is impossible to read the oral evidence, the report of Balfour and Brock, dated December 22, 1891, and the report of the auditor to the directors of February 3, 1892, without coming to the conclusion that the entry of that large sum as a good asset without explanation was unjustifiable. It is a mere truism to say that the value of loans and securities depends on their realization. We were told that a statement to that effect is so unusual in an auditor's certificate that the mere presence of those words was enough to excite suspicion. But, as already stated, the duty of an auditor is to convey information, not to arouse inquiry, and, although an auditor might infer from an unusual statement that something was seriously wrong, it by no means follows that ordinary people would have their suspicions aroused by a similar statement if, as in this case, its language expresses no more than any ordinary person would infer without it. But Mr. Theobald relies on the fact that he was induced to omit from his certificate all reference to the report which he made to the directors because Mr. Balfour, the chairman, promised to mention that report in his speech to the shareholders, and he did so. But, although Mr. Balfour twice alluded to the

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report, he did so in such a way as to avoid attracting attention to it. The second time he mentioned it was after a dividend had been declared and when a motion to reappoint the auditors was before the meeting. The truth is that not a word was said to convey to the shareholders the substance of the information contained in the report or to induce them to ask any question about it. The balance-sheet and profit and loss account were true and correct in this sense—that they were in accordance with the books. But they were, nevertheless, entirely misleading, and misrepresented the real position of the company. Under these circumstances I am compelled to hold that Mr. Theobald failed to discharge his duty to the shareholders with respect to the balance-sheet and certificate of February, 1892. Possibly he did not realize the extent of his duty to the shareholders as distinguished from the directors, and he unfortunately consented to leave the chairman to explain the true state of the company to the shareholders instead of doing so himself. The fact, however, remains, and cannot be got over, that the balance-sheet and certificate of February, 1892, did not shew the true position of the company at the end of 1891, and that this was owing to the omission by the auditor to lay before the shareholders the material information which he had obtained in the course of his employment as auditor of the company, and to which he called the attention of the directors.

But then it is contended that, even if this be so, there was after all no payment of dividend out of capital, and further that, even if there was, still that such payment was not the natural or immediate result of Mr. Theobald's certificate and of the accounts which he prepared. Whether the payment was made out of capital or not is a question of fact. The payment was professedly made out of profits made by the bank, by charging its customers with interest and commission on loans and discount. The books shewed such profits; but the question is, Where did the money come from with which the dividends were paid? The money came from cash at the bankers or in hand; but this cash could not be properly treated as profit, and the directors and auditors knew this perfectly well. This part of the case has been most carefully investigated by the learned judge whose decision we

are reviewing and, after attending closely to the observations of counsel on the reasonings and conclusions contained in the judgment appealed from, I see no reason whatever for dissenting from them. On the contrary, I entirely agree with the learned judge in saying that the profits for the year 1891 never really existed except on paper, and that, to use his words, "whatever may be the right line to draw as to when profit not received may be carried to profit for the purpose of the annual revenue account, it is plain that there was no justification for so doing in the present case." The real truth is that the assets of the bank were put down in the balance-sheet at far too high a figure, and this entry, though not misleading if explained (as it was to the directors), was seriously misleading in the absence of explanation. Mr. Theobald says that he regarded the assets of the bank as only locked up; but his report and the schedule to it go far beyond this. The value of the principal asset depended on the probability of the Balfour group of companies and some of the other large borrowers repaying their loans. They were financing each other; their indebtedness to the bank had increased largely during the year; the securities held by the bank for these loans were, to say the least, to a great extent of very doubtful value; and yet the total amount due to the bank in respect of these loans is inserted in the balance-sheet as a good asset, without any deduction and without a word of explanation to the shareholders. We know now that those assets have realized a comparatively small sum, and we were very properly warned against the danger of doing injustice by being wise after the event. But, disregarding the result of realization, and attending only to what was known to the auditors in February, 1892, the entry in the balance-sheet of the sum of 346,975*l.* as a good asset was wholly unjustifiable, unless explained. We are now in a position to understand the true meaning of the passage contained in the auditors' report to the directors of February 3, 1892, and which runs thus: "We cannot conclude without expressing our opinion unhesitatingly that no dividend should be paid this year." I find it impossible to treat this as a statement by the auditors that there are profits divisible amongst the shareholders, but that the auditors cannot recommend a dividend. I can only regard

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the passage as meaning that there are no funds out of which a dividend can properly be paid, and therefore no dividend ought to be paid this year. A dividend of 7 per cent. was, nevertheless, recommended by the directors, and was resolved upon by the shareholders at a meeting furnished with the balance-sheet and profit and loss account certified by the auditors, and at which meeting the auditors were present, but silent. Not a word was said to inform the shareholders of the true state of affairs. It is idle to say that these accounts are so remotely connected with the payment of the dividend as to render the auditors legally irresponsible for such payment. The balance-sheet and account certified by the auditors, and shewing a profit available for dividend, were, in my judgment, not the remote, but the real operating cause of the resolution for the payment of the dividend which the directors improperly recommended. The auditors' accounts and certificate gave weight to this recommendation, and rendered it acceptable to the meeting. It was wholly unnecessary for the official receiver to call a shareholder to say that he was induced by the auditors' certificate to concur in the resolution to pay a dividend. As to this part of the case res ipsa loquitur.

A point was made that the form of the order was wrong. But there is nothing in this. Mr. Theobald could obviously be sued alone in an action at law for breach of his statutory duty as auditor, and for damages resulting from the breach of duty, and the measure of damages would be the sum which he has been ordered to pay. Whether a similar action at law could be maintained against him and the directors jointly is more open to question. I am by no means satisfied that it could not, seeing that the wrongful payment of the dividend was caused by his improper certificate and accounts, and by the use made of them by the directors. But, be this as it may, there was a clear breach of trust by the directors, facilitated, and, indeed, only rendered possible, by the auditor who failed in discharging his own duty to the shareholders; and I have no doubt that in equity both he and they could be properly declared jointly and severally liable for the misapplication of the company's money which constituted that breach of trust. See *Leeds Estate Building*

and Investment Co. v. *Shepherd.* (1) With respect, therefore, to the sum of 8486*l.* 11*s.*, wrongfully paid as dividend in 1892, in respect of the alleged profits made in 1891, the appeal, in my opinion, fails.

I agree with Vaughan Williams J. in holding that the dividend for 1890 was in fact improperly declared and paid. But the evidence that Mr. Theobald was guilty of any breach of duty in certifying the accounts in February, 1891, is far less cogent than that which presses so heavily against him with reference to the accounts of February, 1892. The truth is that the conviction that the bank's affairs were every year getting worse and worse grew upon him year by year. This state of things was shewn by the decrease of its investments and reserve capital and the increase of its loans to customers. But the loans to customers and other securities were, speaking roughly, 100,000*l.* less at the end of the year 1890 than at the end of 1891, and, seeing that the accounts prepared by the auditors did accurately represent the position of the company as shewn by the books, and that it is not proved that Mr. Theobald really knew, or ought then to have known, that the position of the bank was not correctly shewn by the books, I think Vaughan Williams J. has gone too far in holding Mr. Theobald liable for this sum. The reasons which induced the learned judge to decide that Mr. Theobald was not liable for the dividends paid in 1889 and 1890 appear to me to apply also to the dividend paid in 1891 in respect of the profits of 1890. No doubt the change made by the auditors in 1886 in the form of the certificate they had previously given is very significant, and, unexplained, leads to the inference that the auditors did not believe that the books of the company and the balance-sheet prepared from them correctly shewed the position of the bank. But Mr. Theobald's evidence does, in my opinion, shew that in February, 1891, matters were not known or believed to be so bad as to lead him to the conclusion that there were then no profits out of which a dividend could properly be paid. It is true that the position of the bank was very unsatisfactory in 1890, and the auditors knew it to be so. This, however,

(1) 36 Ch. D. 787.

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appeared from the balance-sheet and accounts which they laid before the shareholders. It is known now that the assets were put down at too high a figure; but it is not proved that the auditors knew it, or ought to have known it. The Balfour group of companies, though dependent on each other, were by no means in so tottering a state as they were a year later. Wilkinson's debt was still treated by the directors as bearing interest and as a good or, at all events, not as a bad debt. Benham's debt was unsatisfactory; but the auditors can hardly be blamed for treating it as good, having regard to the solicitor's statement as to the security held for it. This part of the case is very near the line; but, having carefully considered it, I do not think that the evidence is sufficiently strong to establish a case of misfeasance on the part of Mr. Theobald in February, 1891. I am not satisfied that he was then guilty of more than an excusable error of judgment; although, now that all the facts are known, the error is seen to have been very serious in its consequences. As to the sum of 5946*l.* 12*s.*, therefore, the appeal must be allowed. As regards costs, Mr. Theobald's appeal has resulted in reducing the sum for which he has been held liable, but in other respects, and as regards his main contention, it has failed. Under these circumstances he ought not to receive or pay any costs of the appeal, and the only order as to costs will be that the official receiver be paid his costs out of the assets of the company.

Lopes L.J. has read and considered this judgment, and concurs in it.

Rigby L.J. I have had the advantage of reading and considering the judgment just delivered by Lindley L.J., and I might have confined myself to saying that I concur in it; but as I have gone carefully into the evidence as against the appellant, I think that I shall do well to shew how I have come to the conclusion on which my judgment is founded. I shall not attempt to repeat all that is contained in Lindley L.J.'s judgment. Where no reference is made by me to a particular topic it must be taken that I have nothing to add, though I do not wish to detract from anything said.

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This is an appeal against that part of an order dated December 20, 1894, of Vaughan Williams J., which finds Mr. Theobald liable, as one of the auditors of the London and General Bank, to make good to the assets of the company, jointly with other persons, and severally, the amount with interest from the date of the order of two sums, 6768*l.* 6*s.* 9*d.* and 9328*l.* 17*s.* 4*d.*, being respectively the dividends with interest thereon to the date of the order, recommended by the directors and declared by meetings of the company in the years 1891 and 1892 for the years 1890 and 1891. I have not taken the same figures as Lindley L.J. did, because there has to be added to the dividends the amount of interest down to the date of the order.

The order was made on a summons taken out by the liquidator of the company in the matter of the Companies Acts and in the matter of the bank, asking, so far as is material for the present appeal, for a declaration of the joint and several liability of the directors and auditors of the company, on the ground that the dividends before mentioned were not paid out of profits but out of capital, and, so far as the auditors were concerned, on the ground that they certified and reported that the balance-sheets which were laid before the company at the said meetings purported to shew profits in excess of the sums so paid as dividends. I understand the application to have been in substance an application against the auditors as officers of the company under the 10th section of the Act of 1890 to compel them to contribute to the assets of the company by way of compensation for their misfeasance such sums as the Court may think just.

The main issues, therefore, seem to be—(1.) whether the auditors have been guilty of any misfeasance in relation to the company; (2.) whether the misfeasance has occasioned loss to the company for which compensation ought to be directed to be made. This will involve the question whether the dividends were, in fact, paid, not out of profits, but out of capital, and whether such payment was the fault of the auditors. Then there will be a (3rd) question, What is the amount of compensation which ought to be directed? In order to determine the first question, it

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will be necessary to consider in some detail the position and duty of the auditors, what they ought to have done, and what they have done. I need only refer to sub-s. 6 of s. 7 of the Companies Act of 1879, and to those articles of association which have been read by Lindley L.J. The articles of association cannot absolve the auditors from any obligation imposed upon them by the statute, and it may be that they do not in this case impose any greater obligations as to the balance-sheet, though they make it clear that similar obligations extend to all accounts placed before the company, including the profit and loss account as well as the balance-sheet. Under the statute the members of the company are entitled to have the safeguard of an expression of opinion of the auditors to the effect, first, that the balance-sheet is a full and fair balance-sheet, and, secondly, that it, the balance-sheet, is properly drawn up so as to exhibit a true and correct view of the state of the company's affairs. The words "as shewn by the books of the company" seem to me to be introduced to relieve the auditors from any responsibility as to affairs of the company kept out of the books and concealed from them, but not to confine it to a mere statement of the correspondence of the balance-sheet with the entries in the books. A full and fair balance-sheet must be such a balance-sheet as to convey a truthful statement as to the company's position. It must not conceal any known cause of weakness in the financial position, or suggest anything which cannot be supported as fairly correct in a business point of view. The provision as to the balance-sheet being properly drawn up so as to exhibit a correct view of the state of the company's affairs is taken from, though it does not go quite so far as, article 94, Table A, of the schedule to the Companies Act of 1862. Treated as an addition to the requisition of a full and fair balance-sheet, it may not be easy to define the full extent of the obligation which it imposes, nor is it necessary to do so in this case, for it certainly requires a more detailed explanation of the affairs of the bank than is contained in any of the balance-sheets of this company.

It will be important to see what information the auditors actually acquired as to the business of the company, and the

way in which they reported upon the successive balance-sheets. Mr. Theobald and Mr. Timms were auditors of the bank from its incorporation in 1882, and they made the audits for successive years down to and including the audit for 1891. The reports of the auditors to the members always took the form of a certificate or memorandum written on the balance-sheet for the year. Their reports on the accounts for the years 1882 and 1883 contained a statement to the effect that in their opinion the balance-sheet exhibited a true and correct view of the position of the bank. In their report on the accounts of 1885 a somewhat less emphatic statement to the same effect appears; but in the subsequent reports no such statement is to be found. In a report to the directors dated February 11, 1886, which refers to the accounts for 1885, Mr. Theobald, after noticing that the first-class investments, kept by bankers for quick realization in case of need, stood at a considerably reduced sum, and that more than the whole capital of the company was invested in four accounts, namely, the accounts of the Liberator Society, the Lands Allotment Company, the House and Lands Company, and the Building Estates Company, and that these investments would not be easily realized in critical times, proceeds to say: "You are doubtless aware that it is a rule with bankers to have at hand in cash or easily realizable securities an amount equal to at least one-third of the customers' current accounts. Considering the small amount of uncalled capital, I consider that in this case this proportion is scarcely sufficient." There can be no doubt that even at this time Mr. Theobald was aware that the state of affairs of the bank was unsatisfactory in the important points of lock-up of capital and consequent deficiency of realizable securities.

[His Lordship then referred to the figures in the report for 1885, comparing them with those in the report for 1891, and continued:—]

The reports of the auditors to the members on the accounts for 1886 to 1890, both inclusive, are simply to the effect that the cash and bills receivable are correct, that securities had been produced for the investments and loans (no information being given as to the amount of the securities), and that the balance-sheet agrees with the books of the company. The report on the

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accounts for 1891 states that the balance-sheet is a correct summary of the accounts recorded in the books. In the last-mentioned report is contained for the first time the statement, "The value of the assets as shewn on the balance-sheet is dependent upon realization."

Great stress has been laid by counsel for the appellant on the statement last quoted. They have argued that it was sufficient to put members upon inquiry, and that from the course taken at the trial they were debarred from giving the evidence of experts as to the importance and signification of it. I may at once say that it was the duty of the auditors to convey in direct and express terms to the members any information which they thought proper to be communicated, that the words of the statement are perfectly clear in their meaning, but also entirely unimportant, amounting to a mere truism, and that no evidence of experts would have been of the slightest use for the purpose of giving them a greater importance or signification than they possess in themselves, even if such evidence were admissible. To me it appears that all the reports from 1886 onwards were imperfect, and that the auditors in giving reports in such a form failed entirely to fulfil the statutory duties imposed upon them. Counsel for the appellant argued that such a failure would not amount to misfeasance but only to negligence, and that the appellant is not charged by the summons with negligence; but I cannot admit the cogency of that argument. The reports were made in order to fulfil the statutory obligation, and to be read to the meetings in accordance with the statute. Mr. Theobald, with reference to this matter, says in his evidence, "My certificate means the same as the Act." Then he is asked, "Do you say you could have given the certificate required by the Act of 1891?" (I think that question must have been meant and understood to mean, "Could you have given the certificate for 1891 required by the Act?") Answer. "Yes, certainly." Question. "Then why did you not do so?" Answer. "Because I was not aware that it was considered necessary for me to give the certificate either in the words of the Act or not at all." Mr. Theobald's interpretation of his own certificate cannot be received either in his favour or against him, and we should not unduly

press against him apparent admissions made in the course of a very trying cross-examination. But this evidence of his does, I think, go so far as to shew that the certificates were in fact given as reports under the Act, and independently of that evidence I think there can be no doubt that they were intended to be and were received and acted upon as reports under the Act.

I consider the giving of the certificates (assuming them to be to the knowledge of the auditors misleading certificates, a question which I propose to consider separately) to be a misfeasance within the meaning of s. 10 of the Act of 1890, and not a mere act of negligence: and that this was the meaning of the charge contained in the summons. I can have no doubt, having regard to the terms of the certificates given and the explanations of Mr. Theobald himself, that there was a strong and growing feeling of dissatisfaction in the mind of Mr. Theobald at the state of the affairs of the bank as shewn by its books, and I find no sufficient communication of facts causing this dissatisfaction in the reports. The balance-sheets when examined do not in my opinion fulfil the statutory requirements of being full and fair balance-sheets, and are not properly drawn up so as to exhibit a true and correct view of the state of the company's affairs as shewn by the books of the company. To establish this, it is necessary to give a short summary of the evidence, as to the years 1889, 1890, and 1891, the only years as to which we have sufficient evidence to be able to arrive at definite conclusions.

[His Lordship then examined the evidence at considerable length as to the management and financial position of the company from 1889 to 1891, and especially as to the dealings with the Balfour group of building societies and other debtors, particularly Benham and Wilkinson, and the knowledge of the auditors of the insufficiency and difficulty of realization of the securities held by the company. He also specially referred to the report presented by the auditors to the directors in February, 1892, the important paragraphs of which are set forth above, and to Mr. Theobald's evidence in explanation of his conduct respecting the certificate and report laid before the shareholders. His Lordship then continued:—]

In reporting the balance-sheet of 1891 without explanation

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the auditors were, in my judgment, guilty of a misfeasance within the meaning of the 10th section of the Act of 1890, as charged in the summons, and were in this case, at any rate, thoroughly alive to the unsatisfactory state of the affairs of the bank. They could not but be aware that the balance-sheet was not properly drawn up so as to shew the state of the affairs of the bank as shewn by the books.

The next question is whether the misfeasance was the cause of loss to the company. From the examination of the evidence to which I have referred, I should be led to the conclusion that the auditors did know that a dividend could not properly be paid out of profits. Assuming all the Balfour companies, and Benham and Wilkinson, to have been able to pay the whole of the sums owing from them, except the amounts debited in 1891 for interest and commission, not only the profits available for dividend would be swept away, but of the reserve fund itself little or nothing would have remained. Such an assumption, however, in my judgment, would have been extravagantly favourable to the auditors, and it only required that one of the debts owing by Wilkinson, or almost any one of the Balfour companies, should prove to be bad, in order to exhaust everything belonging to the bank that was not capital. It turned out that each of the Balfour companies, as well as Wilkinson and other debtors of the bank, were insolvent. In my judgment, it is established that the bank had no funds out of which the dividends could in any point of view be paid. I think the auditors might well be held to have known—but I do not rely upon that conclusion for my judgment; what I do rely upon is that the auditors must have known, and did know, that the balance-sheet was not properly drawn up so as to shew the state of affairs, and that was a misfeasance. If the auditors were guilty of misfeasance in relation to the company, they must be responsible for the consequences of such misfeasance, whether they themselves had arrived at the conclusion that the dividend if paid at all would be payable out of capital or not.

That the dividend was in fact paid out of capital cannot, I think, admit of doubt. It was, indeed, argued that before the stoppage of the bank the profits entered in the 1891 balance-

sheet were in fact paid by appropriation of moneys paid in to the current accounts. This would not apply to a case like Wilkinson's, where there was no live account, but in my judgment the rule in *Clayton's Case* (1) has no sort of application under the circumstances. If it had, a bank might always pay profits by mere book entries, though the customers against whom interest and commission were charged might all be hopelessly insolvent. Was then the loss occasioned by the misfeasance of the auditors? It has been argued that the payment of the dividend was not the proximate result of the auditors' report, as the recommendation of the directors and the vote of the meeting had to intervene. This appears to me to misrepresent the true state of things. The report of the auditors was a continuing representation, made indeed before, but in law and in good sense to be treated as repeated after, the recommendation of the directors. It was perfectly well known to Mr. Theobald (at any rate at the meeting where he was present and heard the reading of the report recommending a dividend, and the speech of Mr. Balfour) that this report of his was intended to be relied upon as justifying the recommendation and as an invitation to vote the dividend. Not only was the report a causa sine quâ non of the vote, but it was in my judgment a causa causans.

How far the judgment should go against the appellant is a question which has given me considerable difficulty. A great deal of the reasoning which has led me to hold that their reporting on the accounts of 1891 as they did was a misfeasance in relation to the company applies only to the case of that last report. The learned judge has held Mr. Theobald liable not only for the 1891 but also for the 1890 dividend. I am far from saying that he is clearly wrong; but I cannot satisfy myself that he is clearly right. In the case of the 1890 dividend, it is not on the evidence made out to my full satisfaction that the auditors knew the balance-sheet to be substantially misleading; and I think it safer to confine the order to the dividend in respect of 1891. Therefore, the order will stand as to one dividend with interest, but not as to the other.

(1) 1 Mer. 572.

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Cohen, Q.C., said that the official liquidator had made a compromise with the directors, who were jointly liable with Mr. Theobald, and urged that the appellant ought not to pay all the costs in the Court below.

Lindley L.J. You may add this to our order, "Without prejudice to any question how the costs are to be borne." The directors are not here, and we cannot make any order against them.

Order affirmed as to dividend of 1891.

Solicitors: *E. C. Rawlings; Phelps, Sidgwick & Biddle.*

M. W.

C. A. 1895 *July* 25; *Aug.* 9.

In re RUSSELL. DORRELL *v.* DORRELL.

[1895 R. 53.]

Will—Remoteness—Gift to Class—Proviso for Settlement of Shares—Invalidity as to some Members of Class—Divisibility of Proviso.

A testator gave his residuary estate in trust, after the death of M. and her husband, for all the daughters of M. who should attain twenty-one or marry under that age; with a proviso that the share of any daughter should be held upon trust for her for life, and after her death upon similar trusts for her children as were thereinbefore declared for the children of M. M. had one daughter only, the plaintiff, who attained twenty-one, and she was born in the lifetime of the testator:—

Held (affirming the decision of Chitty J.), that the proviso for re-settlement of the shares must be construed as applicable to each share separately; and that although it would have been void for remoteness in the case of daughters born after the death of the testator, it was valid in the case of the plaintiff, and therefore she was only entitled to a life interest in the fund.

Appeal from a decision of Chitty J.

The summons in this case was taken out to obtain the opinion of the Court on the construction of the will of George Russell, deceased.

The testator by his will, dated September 11, 1877, devised and bequeathed to his wife Caroline Sarah Russell and James

Dorrell his residuary real and personal estate upon trust for his wife for life; and after her death upon trust for his niece Mary Dorrell, the wife of James Dorrell, during her life; and after her death upon trust for James Dorrell during his life; and after his death upon trust for conversion and investment, and upon trust to hold the proceeds of his said residuary real and personal estate upon the following trust: "In trust for all and any the children or child of the said Mary Dorrell who being a son or sons shall live to attain the age of twenty-one years, or being a daughter or daughters shall attain that age or marry under that age, to be divided between them, if more than one, in equal shares and proportions; and if there shall be only one such child in trust for that one and only child. Provided, also, and I do hereby expressly declare, that the trustees or trustee for the time being of this my will shall stand possessed of the share of any daughter under the provision hereinbefore made upon trust to invest the same as hereinbefore expressed, and to pay the rents, interest and dividends arising therefrom unto her for the term of her natural life, for her sole and separate use and benefit, free from the debts, control, or engagements of any husband with whom she may intermarry; and from and after her decease then upon similar trusts for the benefit of her children as are hereinbefore provided for the children of the said Mary Dorrell; but I direct that if any settlement shall be executed on the marriage of such daughter or other female issue as aforesaid, then the share, stocks and funds to which such daughter or other female issue as aforesaid shall be entitled shall be transferred to the trustees or trustee of such settlement, to be held by them upon the trusts thereof."

The testator made four codicils to his will, by the fourth of which, dated June 2, 1883, he revoked the gift of any share or interest which any son or sons of Mary Dorrell might become entitled to in the proceeds of the sale of his real and personal estate after the decease of Mary Dorrell and James Dorrell, and directed that his trustees should stand possessed of the whole of such proceeds in trust for the daughter or daughters of the said Mary Dorrell as in his said will directed.

The testator died on October 20, 1885, leaving no children.

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His widow Caroline Sarah Russell died on December 7, 1885. Mary Dorrell was married to James Dorrell in 1855; she had two daughters, one of whom died an infant, unmarried, and the plaintiff Catherine Mary Dorrell, who attained the age of twenty-one years in the lifetime of the testator. Mary Dorrell died on June 29, 1894.

The summons was taken out by Catherine Mary Dorrell, and the opinion of the Court was asked whether she was entitled to an absolute interest subject to her father's life interest in the fund, or only to a life interest. The summons was heard by Chitty J., who held that the plaintiff Catherine Mary Dorrell was not absolutely entitled to the trust property, but only to a life interest; and the plaintiff appealed from this decision.

Upjohn and *W. L. Richards*, for the appellant. The plaintiff on attaining twenty-one attained a vested absolute interest in the whole fund, after the death of her parents, subject only to be divested partially by the birth of other daughters of Mary Dorrell who might live to attain that age. This absolute interest is not defeated by the proviso for the settlement of the daughters' shares, which is void for remoteness. The gift to the daughters of Mary Dorrell is a gift to a class, and it cannot be split into gifts to the individual members. And the proviso for settlement of these shares applies to the whole class, and if it would be void in the case of any member of the class it is void as to the whole class. It is admitted that it would be void in the case of a daughter born after the testator's death whose children might not attain twenty-one within the period of vesting allowed by law, and, that being so, it follows that the proviso is void as to the whole class of Mary Dorrell's daughters. The form of the gift to "that one and only child," if there should be but one, makes no difference; it is not a separate gift, but only an explanation of the meaning of the gift to the class. The authorities are not altogether consistent, but their principle is clearly in our favour: *Leake* v. *Robinson* (1); *Arnold* v. *Congreve* (2); *Pearks* v. *Moseley* (3); *Greenwood* v. *Roberts* (4);

(1) 2 Mer. 363.
(2) 1 Russ. & My. 209.
(3) 5 App. Cas. 714.
(4) 15 Beav. 92.

Evers v. *Challis* (1); *In re Bence* (2); *In re Ridley* (3); *In re Michael's Trusts* (4); *Proctor* v. *Bishop of Bath and Wells.* (5)

Hewitt, for the defendants. We do not deny that the gift to the daughter is a gift to a class; but the proviso for settlement treats the share of each daughter as separate, and may be reasonably applied to the shares of those who might be in esse at the testator's death, although it may be void as to those subsequently born. With respect to the plaintiff's share, the proviso is not too remote, and there is no reason why it should not take effect. The later authorities are all in our favour: three Vice-Chancellors, Shadwell, Page Wood, and Kindersley, have concurred in the same view: *Griffith* v. *Pownall* (6); *Cattlin* v. *Brown* (7); *Wilson* v. *Wilson* (8); *Knapping* v. *Tomlinson* (9); *Herbert* v. *Webster* (10); Theobald on Wills, 4th ed. p. 483.

Oldham, for the trustees.

W. L. Richards, in reply.

Cur. adv. vult.

Aug. 9. RIGBY L.J. delivered the judgment of the Court (Lord Halsbury L.C., Lindley and Rigby L.JJ.). After stating the material portions of the will of the testator, G. Russell, and the facts set forth above, his Lordship proceeded as follows:—

Under the combined effect of the will and the fourth codicil, and subject only to the life interests of the settlement, the plaintiff, immediately on the death of the testator, became entitled to all the proceeds of the testator's real and residuary personal estate for a vested interest, liable only to be partially divested in the event (which never took place) of any sister or sisters living to attain twenty-one, or marrying under that age. After the death of her mother and sister this vested interest became absolute, subject only to a life interest in her father and to the proviso on which the question in this case turns. The plaintiff has taken out an originating summons to have it

(1) 7 H. L. C. 531.
(2) [1891] 3 Ch. 242.
(3) 11 Ch. D. 645.
(4) 46 L. J. (Ch.) 651.
(5) 2 H. Bl. 358.
(6) 13 Sim. 393.
(7) 11 Hare, 372.
(8) 28 L. J. (Ch.) 95.
(9) 10 Jur. (N.S.) 626.
(10) 15 Ch. D. 610.

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determined whether she is entitled absolutely, or whether she takes a life interest only.

It is suggested that the proviso for the settlement of the shares which I have read is void for remoteness, inasmuch as there might have been a daughter of Mary Dorrell born after the testator's death who would live to take a vested interest, and whose children would not necessarily attain twenty-one within the period allowed by law for the postponement of the vesting of a benefit. No doubt, in the case of such a daughter, the settlement over directed by the proviso would have been void; but it would be perfectly good as to the interest taken by the plaintiff, who was alive at the testator's death, unless the possible operation of the proviso with reference to the share of a daughter not in existence at the testator's death make the whole proviso void. Looking at the state of things at his death, it was then clear that the plaintiff must take either the whole or a share, and other daughters of Mary Dorrell might come in and take shares. Assuming them to do so, yet the share of the plaintiff and the shares of such other daughters would be perfectly separate and distinct, and completely ascertained and separated within the limits of vesting allowed by the law. The proviso in no way mixes them up, but operates separately upon each share. The settlement of the plaintiff's share directed by it is perfectly legal, and would have been so even though there were other shares to which the proviso could not legally apply.

If, indeed, there had been a proviso which could only operate upon all the possible shares, if it operated at all, the case would have been different; but the settlement of the plaintiff's share is to take place, whether there are other shares or not, and it takes place as from the testator's death in favour of the children of a person then living, and is quite unobjectionable. This is not the case of a gift over, which depends upon events so stated as to involve a possibility of its taking effect outside the permitted limits, or in favour of persons who might take interests vesting beyond those limits. No splitting of the clause is necessary, since it is so framed as to apply separately to the plaintiff's share. On principle, therefore, the judgment of Chitty J. ought to be supported.

The supposed conflict of authority, when the decisions are looked into, is not so great as the appellant's counsel attempted to make out. No case binding on the Court of Appeal has been cited which in any way conflicts with the conclusion above arrived at; and, indeed, there is no case in which, after argument, any conflicting decision has been arrived at. On the other side, the cases of *Griffith* v. *Pownall* (1), *Cattlin* v. *Brown* (2), *Wilson* v. *Wilson* (3), and *Knapping* v. *Tomlinson* (4), decided respectively by Vice-Chancellors Shadwell, Page Wood, and Kindersley, are all authorities in support of the conclusion arrived at; and so the weight of authority is clearly in favour of it.

Appeal dismissed.

Solicitors: *Crowders & Vizard, for S. Bromley Garrard, Worcester*; *Kingsford, Dorman & Co., for W. F. & W. Willoughby, Daventry.*

(1) 13 Sim. 393.
(2) 11 Hare, 372.
(3) 28 L. J. (Ch.) 95.
(4) 10 Jur. (N.S.) 626.

M. W.

CHITTY J.

1895

Aug. 9, 10.

In re LORD COLERIDGE'S SETTLEMENT.

Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 21, 22, *sub-s.* 2; *s.* 53—*Capital Moneys in the hands of Trustees—Direction as to Investment by Tenant for Life.*

The exercise in good faith of the power of direction as to the investment or other application of capital moneys in the hands of the trustees given to the tenant for life by sub-s. 2 of s. 22 of the Settled Land Act, 1882, cannot be controlled by the trustees or by the Court.

SUMMONS for the determination of the question whether the power of direction given to the tenant for life under the settlement by s. 22, sub-s. 2, of the Settled Land Act, 1882, as to the investment of capital moneys arising under the Act and in the hands of the trustees was limited to giving a general direction for reinvestment under s. 21, sub-s. (i.), of the Act, or whether the tenant for life had power to direct the investment of such moneys in any particular securities; and if the tenant for life had such power, whether the investments selected by him and mentioned in the summons were proper securities for the investment of moneys subject to the trusts of the settlement.

By a settlement dated July 11, 1887, the late Lord Chief Justice Coleridge conveyed and assigned certain freehold and leasehold premises, including a leasehold house No. 1, Sussex Square, Hyde Park, to trustees upon certain trusts therein mentioned, under which trusts the present Lord Coleridge was tenant for life, and it was amongst other things declared that capital moneys arising under the Settled Land Act, 1882, from the premises thereby settled might be invested by the trustees, who were appointed trustees for all the purposes of the Act, in any investments in which trustees are by law allowed to invest trust funds, or in the public stocks, funds, or Government securities of the United Kingdom or India, or any other colony or dependency of the United Kingdom, or upon freehold, copyhold, or chattel real securities in England, or in or upon the stocks, funds, debentures, mortgages, or securities of any corporation or company or public body, municipal, commercial, or otherwise, in the United

Kingdom or India, or any other colony or dependency of the United Kingdom, or in or upon the stocks, funds, or securities of the Russian, Dutch, Brazilian, Belgian, Swedish, Chilian, French, Italian, Greek, or German Governments (but not in any other mode of investment), and that any such investment might be varied into or for any other of the description aforesaid at the discretion of the said trustees or trustee.

The leasehold premises No. 1, Sussex Square, were sold by the tenant for life, and the purchase-moneys paid to the trustees.

The tenant for life had directed the trustees to invest the purchase-moneys in the debenture stock of certain commercial joint stock companies, including certain hotel companies, all which investments were within the scope of the investment clause of the settlement.

The trustees having raised an objection as to the desirability of the investments directed by the tenant for life, took out this summons.

Mark Romer, for the trustees. The only direction which the tenant for life can give to the trustees is to invest or apply the money according to some one or other of the eleven sub-sections in s. 21, each of such sub-sections being regarded as a whole. In regard to the various modes of investment or application specified in each sub-section, the choice of the particular investment or application lies with the trustees.

E. C. Macnaghten, for the tenant for life. So long as the tenant for life honestly exercises the discretion given him by the Act, he cannot be controlled by the trustees or by the Court.

CHITTY J. This is an application by the trustees of the settlement executed by the late Lord Coleridge in 1887 for the purpose of obtaining the decision of the Court on the question whether they will be justified in investing certain capital money which has arisen from a sale of a leasehold house, part of the settled property, according to the direction of the present Lord Coleridge, the tenant for life in possession. The sale was effected by him under his statutory power. The settlement

CHITTY J. 1895 *In re* LORD COLERIDGE'S SETTLEMENT.

contains a wide power of investment. It expressly refers to the Settled Land Act, 1882, and declares that capital money arising under that Act may be invested in the names of the trustees or under their control in any investments in which trustees are by law authorized, or in other the various investments mentioned, including specifically the stocks, funds, debentures, mortgages, or securities of any corporation, company, or public body, municipal, commercial, or otherwise, in the United Kingdom or India, or any colony or dependency of the United Kingdom. The investments which the tenant for life has directed are all within the scope of the settlement power; but they are not such as the trustees themselves would, if they have any discretion in the matter, themselves select. The question turns on ss. 21, 22, and 53 of the Settled Land Act, 1882. Sect. 21 enacts that capital money under the Act shall be invested or otherwise applied wholly in one or partly in one and partly in another or others of the modes after mentioned, and these modes are specified in the eleven following sub-sections. This division into eleven sub-sections is merely for the sake of clearness and convenience. Sub-sect. (i.) runs thus:—"In investment on Government securities" (by s. 2 this term includes stocks, funds, and shares), "or on other securities on which the trustees of the settlement are by the settlement or by law authorized to invest trust money of the settlement, or on" other the securities mentioned in the sub-section. Sect. 22 enacts that the investment or other application of capital money by the trustees "shall be made according to the direction of the tenant for life, and in default thereof, according to the discretion of the trustees." It was argued by counsel for the trustees that the only direction which the tenant for life could give to the trustees was to invest or apply the money according to some one or other of the eleven sub-sections in s. 21, each sub-section being regarded as a whole; and that, in regard to the various modes of investment or application specified in each sub-section, the choice of the particular investment or application lay with the trustees. There is nothing in the Act to justify this construction; it would cut down the power of the tenant for life in a manner not contemplated by the legislature, and render it almost nugatory. The argument was abandoned,

and rightly, by counsel on my pointing out some of the results which ensue from its adoption. The power thus conferred on a tenant for life of directing the mode of investment, and of selecting the particular investment, is, no doubt, extensive. The enactment is in accordance with the general policy of the Act; in cases falling within its provisions the Act transfers, in regard to investment, a function ordinarily exercised by trustees from the trustees to the tenant for life. The only limitations imposed on him are those to be found in the Act itself—notably in the 21st and 53rd sections. By the 53rd section a tenant for life in exercising any power under the Act is bound to have regard to the interests of all parties entitled under the settlement, and in relation to the exercise thereof by him is deemed to be in the position and to have the duties and liabilities of a trustee for those parties. Supposing that this case had not fallen within the Act, and that the trustees had, in the exercise of their ordinary discretion, selected these securities in good faith, their discretion could not have been questioned; they would have been acting within the scope of the authority conferred on them by the settlement. Similarly, the tenant for life in the exercise of his statutory power cannot be controlled by the trustees or by the Court, so long as he really and honestly exercises his discretion. This the present tenant for life has done: he has considered the question of the propriety of the investments and has consulted a broker of good standing in the City of London, who has advised him on the subject. He has offered to produce an affidavit verifying the paper on which the broker's advice is given. This should be done. I hold, then, that the trustees will be safe in complying with the direction given, and that they are bound to comply with it.

Solicitors: *C. & S. Harrison & Co.; Spencer Whitehead, for Blackmore, Shield, & Mackarness, Alresford.*

G. M.

NORTH J. 1895 July 26.

LORD BATTERSEA *v.* COMMISSIONERS OF SEWERS FOR THE CITY OF LONDON.

[1895 B. 2912.]

Prescription Act (2 & 3 *Wm.* 4, *c.* 71), *ss.* 3, 4—*Light—Commencement of Right of Action.*

An inchoate title under the Prescription Act cannot be treated as complete even if effectual interruption before the title becomes absolute is impossible.

In an action to restrain interference with access of light, an interlocutory injunction was granted; but so as not to prevent building up to the height of houses removed more than nineteen and less than twenty years before action brought.

THE plaintiffs were the lessees for a term of eighty-two years from June 24, 1856, of Weavers' Hall, in Basinghall Street, London. The defendants were proceeding to build offices immediately opposite the plaintiffs' premises. The site of the proposed buildings, including some land that had been thrown into the street and a proposed roadway, was formerly occupied by four houses, numbered respectively 72, 73, 74, and 75, Basinghall Street. Those houses were pulled down in the year 1875, and no buildings of great elevation had stood on any part of the site since. The house No. 75 was pulled down in May, 1875. The other three houses were pulled down in October, 1875. The space had, in the meantime, been occupied by buildings of low elevation. The writ in this action was issued on July 16, 1895.

The plaintiffs claimed an injunction to restrain the defendants from building so as to interfere with access of light to their premises. The plaintiffs' windows on the side of the defendants' building were more than twenty years old.

The action was brought on upon motion for an interlocutory injunction in terms of the claim.

Swinfen Eady, Q.C., and *J. G. Wood*, for the plaintiffs. More than nineteen years having elapsed since the old buildings on every part of the defendants' site were pulled down, nothing that the defendants can now do will defeat the plaintiffs' right to

access of light, for there can be no interruption for a year, till the period necessary to make the plaintiffs' right absolute shall have expired: *Flight* v. *Thomas.* (1) It would be absurd to put off granting an injunction till October, and allow unnecessary expense to be incurred. The Court has power to protect the inchoate rights of the plaintiffs.

[NORTH J. In a very similar case Kekewich J. refused to grant an injunction: *Bridewell Hospital* v. *Ward, Lock & Co.* (2) A great injustice might be done to the defendants if they were in the meantime prohibited from building. Circumstances may arise to prevent an action being brought till the interruption shall have existed for a year.]

In our case our windows existed for a period commencing before the twenty years immediately prior to action brought: we submit that, under the special circumstances, we are entitled to consider the period immediately before the buildings were pulled down (namely, from July 16 to October, 1875) as a period of less than a year, during which the enjoyment was interrupted after the twenty years had commenced to run.

Samuel Hall, Q.C., and *John Henderson*, for the defendants. The plaintiffs can only bring their action after the lapse of the full period of twenty years from the day they commenced to enjoy access of light through the space over which they claim their right: *Glover* v. *Coleman* (3); *Presland* v. *Bingham.* (4) They cannot in this action get an injunction, so far as the space formerly occupied by the buildings existing in July, 1875, is concerned, either now or at the trial.

Swinfen Eady, Q.C., in reply.

NORTH J. (after stating the facts). The action was brought to restrain the interruption of the access of light as enjoyed for twenty years past. The question is whether such access has been so enjoyed. Under the 3rd section of the Act, taken alone, an action cannot be brought in respect of a prescriptive right to light unless the access and use of the light has been

(1) 8 Cl. & F. 231.
(2) W. N. (1892) 194; 62 L. J. (Ch.) 270.
(3) L. R. 10 C. P. 108.
(4) 41 Ch. D. 268.

NORTH J. 1895 LORD BATTERSEA v. COMMISSIONERS OF SEWERS FOR THE CITY OF LONDON.

actually enjoyed therewith for the full period of twenty years without interruption, and in that case the right is to be deemed absolute and indefeasible. The phrase "without interruption" is used; and the subsequent section (s. 4) goes on to say what "interruption" means. Had it not been for the earlier section the plaintiffs would have been in this position. If they had not brought their action till the full period of twenty years had expired, the defendants might say the access of light had not been without interruption because there had been the buildings they are now erecting for a part of the period. Then s. 4 comes into play, and defines what an interruption is within the meaning of s. 3. Sect. 4 says: "Each of the respective periods of years"—that is the twenty years in this case—"shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question, and that no act or other matter shall be deemed to be an interruption, within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorizing the same to be made." That section, to my mind, strongly bears out, on this point, what s. 3 says, because the period of years—the twenty years—is to be "next before the suit or action wherein the claim is made." What I am asked to do now is to say that it is quite sufficient that the twenty years shall be calculated, not twenty complete years before action, but twenty years, nineteen years, and rather more of which is before action, the rest of the twenty years being made up during the continuance of the action. It seems to me that such a contention is directly contrary to the meaning of these two sections. I think, therefore, that the action can only be brought after the period of twenty years has elapsed. That view is the view which was taken by Kekewich J., and I know of no case which is in any way at variance with it; and although no doubt it does not follow that because he refused to grant an interlocutory injunction I should necessarily do so too, yet the reason he gives seems to me to be the right reason, and therefore I must act upon that view.

An interlocutory injunction was granted restraining the defendants from building higher than the buildings existing in July, 1875, so as to obscure the plaintiffs' windows.

Solicitors for plaintiffs: *Flower, Nussey & Fellowes.*
Solicitor for defendants: *E. A. Baylis.*

D. P.

CROMPTON & EVANS' UNION BANK *v.* BURTON.

[1895 C. 2310.]

Practice—Payment into Court on Motion—Admission by Defendant—Money received by Defendant but improperly paid away.

Upon an interlocutory motion by the plaintiffs (second mortgagees) that the defendants (the first mortgagee and his solicitor) should be ordered to pay into court the balance of the proceeds of sale of the mortgaged property (which the solicitor admitted that he had received for his client), after deducting what was due in respect of the first mortgage, the solicitor claimed to retain also the amount of payments which he had made to the executors of the mortgagor:—

Held, that though those payments were improper, yet, as the amount of them was not in the hands of the defendants, they could not be ordered to pay it into court upon an interlocutory motion, and they were ordered to pay only the balance of the sale moneys after deducting that amount and the amount due on the first mortgage.

Neville v. *Matthewman* ([1894] 3 Ch. 345) and *Nutter* v. *Holland* ([1894] 3 Ch. 408) considered.

MOTION by the plaintiffs that George Burton and W. J. Burton, two of the defendants, might be ordered to pay into court to the credit of the action the sum of 2835*l.* 19*s.*, being the balance of the proceeds of sale (amounting to 5335*l.* 19*s.*) of certain real estate, at North Wingfield, in the county of Derby, subject to a second mortgage to the plaintiffs for 3000*l.* and interest, after deducting therefrom the sum of 2500*l.*, the amount alleged to be due upon the first mortgage.

The mortgagor of the property was Henry Green, a colliery proprietor, who died on July 3, 1893. The executors and trustees of his will were also made defendants to the action. The mortgages were both made in 1876. The defendant George

NORTH J. 1895 CROMPTON & EVANS' UNION BANK v. BURTON.

Burton was a solicitor, and had been the testator's solicitor. He also acted as solicitor to the trustees of the will. He advised them that the mortgaged property could be sold by them under a power of sale contained in the will. The property was accordingly put up for sale in September, 1894, and was sold in lots for sums amounting in the whole to 5335*l.* 19*s.* The defendant George Burton acted also as solicitor for most of the purchasers. One purchaser, for whom he did not act, took the objection that the trustees could not make a title to the property, on the ground that the power of sale did not arise until after the death of the testator's widow, and she was still living. The defendant George Burton assented to this objection, and he thereupon procured a transfer of the first mortgage dated December 1, 1894, to be made to his son, the defendant W. J. Burton, and the conveyances to the purchasers were then made by the son, he purporting to sell the property under the power of sale contained in the first mortgage. His father acted as his solicitor in the transaction. The purchase-moneys were in fact received by the defendant George Burton, acting as agent for his son.

By the writ in the action, which was commenced on July 9, 1895, the plaintiffs claimed an account of all moneys received by the defendants George Burton and W. J. Burton, or either of them, or which without wilful default or neglect might have been received by them, or either of them, on the sale of the mortgaged property, and payment by those defendants, or one of them, to the plaintiffs, of the balance of those moneys, after providing for what was due to the first mortgagees at the time of the sale; immediate payment into court of the sum of 2835*l.* 19*s.*; the appointment of a receiver and an injunction, with ancillary relief.

On July 17 the plaintiffs gave notice of the motion for payment into court.

In answer to the motion the defendant George Burton made an affidavit to which he exhibited an account of what he had received from the sale, and he said that he was ready to pay the balance shewn by that account into court, or to deal with it as the Court might direct.

The account shewed that he had received the 5335*l.* 19*s.*, and

also 5*l.* 5*s.* 2*d.* for interest, making altogether 5341*l.* 4*s.* 2*d.* From this he claimed to deduct the amount due for principal, interest, and costs in respect of the first mortgage, and paid to the first mortgagees on the transfer, and the costs of the transfer. He also claimed to retain various sums amounting to about 900*l.* which he had paid to the executors of the mortgagor at their request for the purpose of paying wages at a colliery belonging to the testator.

Swinfen Eady, Q.C., and *E. S. Ford*, for the plaintiffs. The payments which the defendants allege that they have made to the executors of the mortgagor were improper and really amounted to breaches of trust. The defendants ought to be treated as having the sum so paid still in their hands, and should be ordered to pay the whole balance (after deducting what was due on the first mortgage) into court.

Vernon Smith, Q.C., and *Rowden*, for the defendants George Burton and W. J. Burton. Whatever may have been formerly the practice, the Court will not now upon an interlocutory motion order a defendant to pay into court money which he admits to have been in his hands, but which he has in fact paid away: *Neville* v. *Matthewman* (1); *Nutter* v. *Holland.* (2) The order should be limited to money which is now actually in the defendants' hands. An order of this kind is made for the purpose of securing a fund; not by way of punishment to the defendant.

The executors did not appear.

E. S. Ford, in reply. If the argument for the defendant is well founded, it would be a good answer to such a motion for the defendant to say, "I admit I received the money, but I have spent it in gambling." In *Nutter* v. *Holland* (2) the question arose upon an originating summons under Order LV., and the defendant swore that he had properly disposed of the money.

NORTH J., after stating the facts, continued:—With regard to the payments to the executors for "wages at colliery" the

(1) [1894] 3 Ch. 345. (2) [1894] 3 Ch. 408.

NORTH J. 1895 CROMPTON & EVANS' UNION BANK v. BURTON.

defendant G. Burton in his affidavit says: "I have included in the account a series of payments made by me between November and March to Mr. Hardwicke (one of the three trustees), on behalf of the trustees, for the purpose of paying wages and other expenses incident to carrying on a colliery forming part of the testator's estate. It was arranged by Mr. Hardwicke with me" (Mr. Hardwicke does not corroborate this) "that I should be recouped in respect of these payments out of the proceeds of sale of the property, and that he would arrange with the bank (i.e. the plaintiffs) to discharge their debt out of the rest of the estate, which, from what I knew of the testator's affairs, I considered would be ample for the purpose when realized." That is, in other words, ready money belonging to the plaintiffs as second mortgagees was to be misapplied, and they were to take their chance of being paid in the future out of an estate which might or might not, when realized, be sufficient for the purpose. And we know from what the defendant has told us that the bank would not make an advance to the executors on the security of the testator's estate without a guarantee from someone else. Under these circumstances such an application of the purchase-money was a gross breach of duty on the part of both the trustee, if he really made the arrangement, and the solicitor who says that he concurred in it. In this state of circumstances I should have thought it was a matter of course that the two defendants George and W. J. Burton, one of whom is the mortgagee, who through his solicitor has received the balance, and the other the solicitor who actually had it in his hands for the mortgagee, should be ordered to pay the balance into court. But I feel embarrassed by the two recent cases in the Court of Appeal, namely, *Neville* v. *Matthewman* (1) and *Nutter* v. *Holland*. (2) It certainly seems to me that those cases have modified the former practice of the Court, and that to a certain extent it may be an answer to a motion for payment of money into court for the defendant to say that the money is not now in his hands. I do not think that those cases go quite so far as has been contended, namely, that a man who has received money, which, if he had it in his hands to day, he would be

(1) [1894] 3 Ch. 345. (2) [1894] 3 Ch. 408.

ordered to pay into court, can escape by stating that he paid the money away yesterday to someone to whom he had no right to pay it, and who had no title to receive it. But I feel a difficulty, having regard to those two cases, in ordering the defendants to pay into court this sum which it is sworn has been paid away to the executors at their request out of the plaintiffs' money. I only orderthe defendants, the Burtons, to pay into court the balance of the purchase-moneys which they have received, after deducting the amount due on the first mortgage and the payments which they have made to the executors.

Solicitors: *Johnson, Weatherall & Sturt, for W. G. Eking, Nottingham; Peacock & Goddard.*

W. L. C.

STIRLING J.

1895
July 23.

MIDDLETON *v.* BRADLEY.

[1895 M. 556.]

Patent—Practice—Costs—Particulars of Objections—Action not brought to Trial—Certificate—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict.* c. 57), *s.* 29, *sub-s.* 6.

The operation of s. 29, sub-s. 6, of the Patents, Designs, and Trade Marks Act, 1883, is not confined to cases where the action is brought to trial.

In the absence (however arising) of a certificate under s. 29, sub-s. 6, the costs of particulars cannot be recovered under an order for payment of the costs of the action.

ADJOURNED SUMMONS.

This action was brought to restrain the alleged infringement of a patent, and to restrain the defendant from passing off his goods as those of the plaintiff. After the delivery by the defendant of his statement of defence and particulars of objection, the plaintiff amended his claim by striking out all the allegations of infringement. Thereupon an order was made to tax the costs relating to that part of the action, and in carrying out that order the taxing master had disallowed all the costs of the defendant's particulars of objection, on the ground that there was no certificate of the Court or a judge that they were reasonable and proper as required by s. 29, sub-s. 6, of the Patents, Designs, and Trade Marks Act, 1883.

The defendant then took out this summons to review the taxation.

W. N. Lawson, for the defendant. The Court has had no opportunity of giving any certificate; and this case is consequently outside the Act altogether, and the defendant is entitled to his costs in the ordinary way. That view is supported by the decisions upon s. 43 of the Patent Law Amendment Act, 1852 (15 & 16 Vict. c. 83): *Greaves* v. *Eastern Counties Ry. Co.* (1); *Batley* v. *Kynock* (2); *Peddell* v. *Kiddle.* (3) The words of the

(1) 1 E. & E. 961. (2) L. R. 20 Eq. 632.
(3) 7 T. R. 659.

present Act (s. 29, sub-s. 6) are somewhat different, no doubt, from s. 43 of the Act of 1852, but the question is whether it has really made any difference on this point.

In all the cases which have hitherto come before the Courts upon this sub-section the actions had been brought to trial before they broke down, and there was consequently an opportunity of seeing what the merits of the cases were: *Longbottom* v. *Shaw* (1); *Germ Milling Co.* v. *Robinson* (2); *Mandleberg* v. *Morley.* (3)

Here the action is altogether withdrawn from the cognizance of the Court, and no certificate can possibly be made. The defendant was obliged to deliver particulars, and it would be unjust to deprive him of the costs because the plaintiff has thus early abandoned his action: *Rothwell* v. *King* (4); *Boake, Roberts & Co.* v. *Stevenson & Howell.* (5)

A. J. Walter, for the plaintiff. The cases on the Act of 1852 were decided on the ground that s. 43 only applied when the action had been brought on for trial. Sect. 29 of the Act of 1883 is not so limited, and applies to the whole action at whatever stage. This case cannot be distinguished from *Mandleberg* v. *Morley* (3), *Longbottom* v. *Shaw* (1), and *Boyd* v. *Horrocks.* (6) [He also referred to *Cole* v. *Saqui.* (7)]

Lawson, in reply.

STIRLING J. (after stating the facts):—It is said that in this case there has been no opportunity of getting any certificate, so that the case is outside the Act altogether. Sect. 29 of the Act of 1883 deals with the whole subject of particulars. It provides that the plaintiff must deliver particulars of the breaches complained of, and the defendant must deliver particulars of the objections on which he relies in support of his defence. Then, under sub-s. 6, it is essential for obtaining any costs with reference to any particulars that there should be a certificate by the Court or a judge that the particulars of breach have been proven, or that the particulars of objections are reasonable and proper.

(1) 43 Ch. D. 46.
(2) 3 Rep. Pat. Cas. 254.
(3) 11 Rep. Pat. Cas. 1.
(4) 4 Rep. Pat. Cas. 397.
(5) 12 Rep. Pat. Cas. 228.
(6) 6 Rep. Pat. Cas. 152, 162.
(7) 6 Rep. Pat. Cas. 45.

STIRLING J. 1895 MIDDLETON v. BRADLEY.

It is said that in this case there was no opportunity of getting any certificate, as the action so far as it related to infringement of the patent was dismissed by the plaintiff of his own motion, and in support of that reference was made to *Greaves* v. *Eastern Counties Ry. Co.* (1) and *Batley* v. *Kynock* (2), which were both decided on the Act of 1852. Sect. 43 of that Act deals with the costs of particulars alone, and it provides that "the plaintiff and defendant respectively shall not be allowed any costs in respect of any particular unless certified by the judge before whom the trial was had to have been proved by such plaintiff or defendant respectively." Upon that it was held in *Greaves* v. *Eastern Counties Ry. Co.* (1) and *Batley* v. *Kynock* (2) that where the action did not come to trial, the defendant was nevertheless entitled to the costs of his particulars. The ground of those decisions was that sect. 43 of the Act of 1852 contemplated only a case where the action came on for trial, and that the general right to costs which was conferred by the Statute of Gloucester was not taken away in a case where the action was not brought to trial or tried. But I have here to deal with a different Act and different language. Under the present Act, the Act of 1883, the certificate is to be given by the Court or a judge, not by the judge who tried the action. It is said that where there is no trial a defendant cannot get any decision of the Court as to the propriety of his objections. I am not satisfied that that is so. It may be that there has been a motion in the case, on which evidence may have been given which would give the Court materials for determining whether the particulars of objections were reasonable; or it may be that there has been some other interlocutory application, perhaps with reference to the particulars themselves, upon which the Court may have had an opportunity of forming an opinion on the subject. I cannot come to the conclusion that sub-s. 6 of s. 29 is limited to the case where an action is brought on for trial and tried. The certificate is to be given by "the Court or a judge," and that is the language used throughout the preceding sub-sections, all of which seem to refer to interlocutory applications. I think, therefore, that the taxing master was right.

(1) 1 E. & E. 961. (2) L. R. 20 Eq. 632.

No doubt this construction of the section may sometimes cause hardship to persons who are in the position of the defendant; but that might also occur where an action is brought to trial and not tried out, and the judge has no means of deciding whether the objections are reasonable or not. Whether that difficulty can be got over is not for me to say. I have only to deal with the Act, and I think that sub-s. 6 of s. 29 is not confined to a case where the action has come on for trial, so that the reasoning on which *Greaves* v. *Eastern Counties Ry. Co.* (1) was decided does not apply. Under the circumstances, I cannot do otherwise than say that I agree with the taxing master, and must dismiss the summons.

Solicitors: *J. H. & J. Y. Johnson; Vincent & Vincent, for Middleton & Sons, Leeds.*

G. A. S.

In re JONES.

Solicitor and Client—Costs—"Agreement in Writing"—Signature by Client only—Business in Police Magistrate's Court and at Quarter Sessions—Jurisdiction of High Court to set aside Agreement—Attorneys and Solicitors Act, 1870 (33 & 34 *Vict. c.* 28), *ss.* 4, 8, 10, 15.

A document purporting to be an agreement as to the payment of costs between a solicitor and his client may be "an agreement in writing" within s. 4 of the Attorneys and Solicitors Act, 1870, even though signed by the client alone.

In re Thompson ([1894] 1 Q. B. 462) followed.

Costs relating to business done by a solicitor in the court of a police magistrate, or in a Court of Quarter Sessions, are subject to taxation in the usual way; and an agreement as to the amount of such costs may be examined into, and, if necessary, be set aside by a judge of the High Court.

The expressions "the Court" or "a judge" in ss. 8 and 10 of the Act of 1870 do not include a Court of Quarter Sessions or a police magistrate's court, or the justices constituting such Courts, but refer to Courts in which actions at law or suits in equity can be brought, and to judges who have power to try such actions or suits.

THIS was a summons asking that a solicitor might be ordered to deliver a bill of costs, and that when so delivered it might be taxed.

(1) 1 E. & E. 961.

STIRLING J. 1895 *In re* JONES.

The applicant was in October, 1893, together with other persons, brought before the borough magistrate at Cardiff on a charge of stealing timber, and retained the solicitor to defend him. On October 11, 1893, he was committed for trial at Quarter Sessions. On October 19 he paid the solicitor a sum of 25*l.* on account of costs. On October 21 he signed the following document: "I agree your costs in the matter of my defence, you to pay counsels' fees, witnesses' fees and all other disbursements, at 75*l.*" This document was handed to the solicitor, but was not signed by him. On the same day the applicant was tried and acquitted. He subsequently paid the balance of the 75*l.*, and afterwards took out this summons.

Upon the summons being opened the preliminary objection was taken on behalf of the solicitor that the document signed by the applicant, although not signed by the solicitor, was a good agreement within the Attorneys and Solicitors Act, 1870; and that it related to business done in the court of the magistrate at Cardiff and in the Court of Quarter Sessions; and consequently could not (regard being had to the provisions of s. 8 of the Act) be examined or set aside by this Court.

Ashton Cross, for the summons. I ask for delivery of a bill of costs, and taxation of the same.

Dunham, for the solicitor. This application is made to the wrong Court. There has been an agreement as to the payment of the costs of the business done for the client by the solicitor, and the costs are not liable to taxation: s. 15 of the Attorneys and Solicitors Act, 1870.

Under s. 8 no action can be brought upon such an agreement, but every question must be determined by the Court in which the business was done. The application should have been made before the Court of Quarter Sessions at Cardiff. Sect. 10 refers to the same Court.

Ashton Cross. I ask for an adjournment in order that I may meet the objection, which has taken me by surprise.

April 23. *Ashton Cross.* The preliminary objection is contrary to the whole practice of the High Court. The Court of Quarter

Sessions is not a continuing Court, and no taxation can take place there; the result is, if the objection be good, that the client has no remedy at all. But bills of costs for work done at Quarter Sessions have frequently been taxed both in the old Court of Queen's Bench and in the Queen's Bench Division.

Under the Act of 2 Geo. 2, c. 23, there is a long series of decisions shewing that the Court of Queen's Bench is the proper Court to tax costs of defending a prisoner at Quarter Sessions or in any criminal court: Pulling on Attorneys, 3rd ed. p. 345; *Clarke* v. *Denovan.* (1) Where the work is not done in any Court, the Court of Chancery has exclusive jurisdiction to order taxation. Business done at law or in equity includes business done at Quarter Sessions: *Sylvester* v. *Webster.* (2) It is stated in the argument to that case that the Court of Quarter Sessions does not tax. Moreover a Court of Quarter Sessions has no officer who can tax. Bills of costs for business done in every kind of Court have been taxed in the Court of Queen's Bench; and that jurisdiction is now transferred to the High Court.

The question is whether the Act of 1870 has effected any change in that respect. In ss. 4, 8, and 10 of the Act the Court referred to is the Court having power to enforce the agreement.

In this case the business was not done in any Court; it was not business done so as to determine rights between contending parties. That is what is meant by business transacted in a Court within s. 8: *In re Thomas* (3); *In re Andrews* (4); *Rees* v. *Williams.* (5) The ground of the latter decision is clearly stated by Bramwell B., where he says that the application should be made to any Superior Court of Law or Equity. *Midland Ry. Co.* v. *Guardians of Edmonton Union* (6), shews that a Court of Quarter Sessions has no power to tax.

Moreover, I submit that this is not an agreement in writing within the Act, because it is not signed by both parties: *In re Lewis* (7); *In re Raven* (8); *Bewley* v. *Atkinson* (9); *In re*

(1) 1 Esp. 137.
(2) 9 Bing. 388.
(3) [1893] 1 Q. B. 670.
(4) 17 Beav. 510, 513.
(5) L. R. 10 Ex. 200.
(6) [1895] 1 Q. B. 357.
(7) 1 Q. B. D. 724.
(8) 30 W. R. 134.
(9) 13 Ch. D. 283.

STIRLING J. 1895 In re JONES.

Frape (1); *In re West, King & Adams.* (2) Some doubt was thrown on *In re Lewis* (3) in *In re Thompson* (4), but it is not clear that what was done there was not really in accordance with what was said in *In re Lewis.* (3)

Moreover, if the Act of 1870 does apply, s. 15 only exempts from taxation the amount due under the agreement; but I submit the case comes under the Act of 1881, and the agreement can be inquired into. This Court has an inherent jurisdiction to tax apart from the statutes, and that remains unaffected: *Storer* v. *Johnson.* (5)

Again, the preliminary objection only goes to the second branch of the summons, that is to say, taxation. Delivery of a bill is quite distinct from delivery with a view to taxation: *Duffett* v. *McEvoy* (6); *In re West, King & Adams.* (2)

If a bill is delivered the case may be found to be one in which the Court will exercise its inherent jurisdiction.

Dunham, for the solicitor. Before the Act of 1870 a client could not make an agreement with a solicitor for a fixed amount. The Act enabled him to do so, and was intended to be a code regulating such agreements.

Sect. 15 not only excludes taxation, but also the provisions of the Act of 1843 as to delivery of a bill.

Duffett v. *McEvoy* (6) only comes to this, that the Court can order immediate delivery of a bill and leave the question of taxation to be determined when it arises. This case falls within the Act of 1870, s. 10. No part of the business was done in the High Court, and this Court has no jurisdiction to tax the bill.

If the applicant wishes to re-open this matter he should, under ss. 8 and 10 of the Act of 1870, apply to the Court in which the business was done, that is, in this case the Court of the stipendiary magistrate at Cardiff, or the Court of Quarter Sessions.

[STIRLING J. What is a judge of a Court of Quarter Sessions? Is it a magistrate who forms part of it?]

Yes. The Court of a stipendiary magistrate is a continous

(1) [1893] 2 Ch. 284, 289.
(2) [1892] 2 Q. B. 102, 106.
(3) 1 Q. B. D. 724.
(4) [1894] 1 Q. B. 462.
(5) 15 App. Cas. 203.
(6) 10 App. Cas. 300.

Court, and would be competent to enforce such an agreement as this under s. 8 of the Act of 1870. That Act is not limited to business done in the High Court. Sect. 4 refers to business done by the solicitor, whether as solicitor or advocate, which shews that business in inferior courts was referred to. It may be that a police court has no machinery for the taxation of bills, but if so that is an omission which could be remedied.

[STIRLING J. Supposing that there is no Court which has any statutory jurisdiction, would it not be a case for the exercise of the inherent jurisdiction?]

The Act of 1870, which for the first time recognised agreements between solicitors and clients, has excluded the inherent jurisdiction of the Court to deal with them. The inherent jurisdiction can only be exercised by an order made in an action. The object and scope of the Act of 1870 is that bills are not to be taxed except under the Act. *Clarke* v. *Denovan* (1) and *Sylvester* v. *Webster* (2) only decide that a solicitor cannot sue without delivering a bill; and *In re Andrews* (3) only decided this, that a revising barrister's court was not a Court of Law or Equity within the Act of 1843, and the Court of Chancery, therefore, had jurisdiction to order taxation of a bill for business done there.

Work done in a criminal court is work done "in a court" within the meaning of the Act of 1870. If the business had not been done in any Court the Court of Chancery would no doubt have had jurisdiction to tax.

[STIRLING J. referred to *In re Gaitskell.* (4)]

That cannot apply to Crown pleas, which are between the Crown and the subject. It cannot be said here that the business was not done in any Court.

Upon the other point, the agreement is signed by the party to be charged, and is a good agreement within the Act of 1870: *In re Thompson.* (5)

Cur. adv. vult.

(1) 1 Esp. 137.
(2) 9 Bing. 388.
(3) 17 Beav. 510, 513.
(4) 1 Ph. 576.
(5) [1894] 1 Q. B. 462, 464.

STIRLING J. 1895 *In re* JONES.

July 27. STIRLING J. (after stating the facts). The first question is whether a written document signed by the client but not by the solicitor is "an agreement in writing" within the meaning of s. 4 of the Act of 1870.

It is not necessary for me to go through the somewhat long course of decisions on the subject, as I think I am bound by the decision in *In re Thompson* (1), where the previous cases were considered. In that case the document was signed by the client only, and Pollock B., in giving judgment, said: "It is said, on the authority of the dictum in *In re Lewis* (2), that the document signed by this gentleman's client is not an agreement in writing within s. 4 of the Attorneys and Solicitors Act, 1870, because it is not signed also by him. In that case the agreement was signed by the solicitor only, and the reason given for requiring the client to sign also is that 'otherwise it would always be possible for a solicitor to place a document, signed by himself only, and containing terms favourable to him, before a client, and then to contend that the client was bound by it.' This observation has plainly no bearing on the present case. It is said that the dictum has been assented to in subsequent decisions; but I do not find this to be the case. It has been quoted, not unnaturally, in judgments in which the effect of the language of the statute has not been carefully considered; but in *Bewley* v. *Atkinson* (3) Thesiger L.J. points out that the expressions used are wider than was necessary for the decision, and it is not supported by *In re Raven* (4), in which Fry J. merely held that a letter written by a client to a solicitor did not shew 'accession in writing.' I think that the document satisfies the statute, and that the client is not now entitled to have the agreement examined by the officer of the Court." Charles J., who was the other judge forming the Court, gave judgment to the same effect, and it was held that an agreement signed by the client alone was an agreement within the statute. I consider myself bound upon that authority to hold that this document is an agreement within the Act.

The next question is whether this Court has jurisdiction to

(1) [1894] 1 Q. B. 462, 464.
(2) 1 Q. B. D. 724.
(3) 13 Ch. D. 283, 299.
(4) 30 W. R. 134.

examine and if necessary set aside this agreement. That is an entirely new question; and though the Act was passed in 1870, and its provisions have been discussed in many cases, and though, as I am told by the experienced master of the Crown Office, agreements relating to the costs in criminal matters have repeatedly been before the High Court, of which the case of *In re Lewis* (1) was an instance, this point has never arisen for decision. The material portions of the Act to be considered are ss. 4, 8, 10 and 15: (His Lordship read those sections, and continued:—) The contention is that the Court having jurisdiction to examine into and enforce the agreement within the meaning of s. 8 is either the Court of the magistrate at Cardiff or the Court of Quarter Sessions: that consequently, under s. 10, one or other of these Courts, or a judge of them, is the proper tribunal to re-open the matter, and that the jurisdiction of this Court is excluded by s. 15.

Now, the words of the early part of s. 4 are extremely wide, and seem to authorize agreements between solicitor and client with reference to all costs capable of taxation under 6 & 7 Vict. c. 73, and it has already been held in *In re Lewis* (1) that a bill of costs in respect of proceedings before magistrates is subject to such taxation. I think, therefore, that the agreement in question is within the Act. Sect. 8 provides that the agreement is to be enforced or set aside by the Court in which the business or any part thereof was done, or a judge thereof. It is contended that the word "Court" in this section includes a Court of Quarter Sessions and a police magistrate's Court. If the word is read in a sense wide enough to include a Court of Quarter Sessions, who are the judges of that Court? They must be either the justices of the peace who took part in the trial of the particular case, and possibly every justice who was qualified to sit on the occasion; so that the application to enforce or set aside the agreement might be made on motion or petition to any such justice. I cannot think that such a result was intended. At all events, I think that what in this Act is referred to as a Court is one of the same type as Courts in which actions at law or suits in equity might be brought. The phrase "a Court or a judge" is first found in

(1) 1 Q. B. D. 724.

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the concluding portion of s. 4, and there the context shews, I think, what is the meaning of it. It is used with reference to business done in an action at law or a suit in equity, and the judges spoken of are those who have power to deal with such actions and suits, and those, I think, must be the judges which were intended to be referred to all through the Act, and not the justices who constitute a Court of Quarter Sessions. Being of this opinion as regards a Court of Quarter Sessions, I think I must come to the same conclusion as regards the magistrate of the police court. The position and duties of such magistrates are regulated by the Act 26 & 27 Vict. c. 97, ss. 3, 5, and the functions which they discharge are those of a justice of the peace.

I come, therefore, to the conclusion that the preliminary objection must be overruled, and the summons must be restored to the paper in the ordinary course.

Solicitors: *Vallance & Vallance, for Hervey E. Murly, Bristol; Riddell, Vaizey, & Smith, for J. H. Jones, Cardiff.*

G. A. S.

STIRLING J. 1895 *July* 27; *Aug.* 1.

In re LAMSON STORE SERVICE COMPANY, LIMITED.
In re NATIONAL REVERSIONARY INVESTMENT COMPANY, LIMITED.

Company—Reduction of Capital—Special Resolutions—Petition for Confirmation by Court—Power of Court to dispense with settling List of Creditors—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 13—*General Order of March* 21, 1868.

Upon a petition for the confirmation by the Court of a special resolution for the reduction of the capital of a company involving the diminution of liability in respect of unpaid capital and the return of paid-up capital to shareholders, the Court has no power to dispense with the settling of the list of creditors required by s. 13 of the Companies Act, 1867, even though there may be evidence before the Court that the company has no debts unsatisfied.

In these two cases petitions were presented by the above-named companies for the confirmation by the Court of special resolutions duly passed by the companies respectively for the

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reduction of their capital. The question in both cases was whether the Court could dispense with the proceedings for settling the list of creditors pursuant to the General Order of March 21, 1868.

The reduction of capital was not required in either case owing to loss of capital, both the companies being very prosperous. In the case of the Lamson Store Service Company the capital of the company was far in excess of its requirements; and resolutions were passed that the capital should be reduced by cancelling 500 shares which had not been taken or agreed to be taken, and by paying off as capital in excess of the wants of the company the capital paid up on 4000 of the shares of the company, and which had been purchased by the company itself, and extinguishing the liability in respect of uncalled capital upon certain of the 4000 shares which had not been fully paid; and, further, by paying off the capital paid up on 2000 other shares of the company by, in effect, returning the money to the shareholders, and borrowing it from them on debentures.

In the case of the National Reversionary Investment Company it was proposed to reduce the capital by the cancellation or extinguishment of 4025 shares, some fully paid and some only part paid, which had been from time to time purchased by the directors on behalf of the company in pursuance of special resolutions passed by the company, and paid for out of capital of the company in excess of its wants. The chief clerk had in each case made an order that the petition should be in the paper for hearing on a certain day, and that the notices required by the Acts should be inserted in certain papers, and that proceedings for settling the lists of creditors pursuant to the General Order of March 21, 1868, should be dispensed with. In the case of the Lamson Company there had been an affidavit made by the secretary of the company that the company was not indebted to any one. In the case of the other company there had been no such affidavit, but it was alleged that the debts of the company were very few and of small amount.

Buckley, Q.C., and *F. Whinney*, for the petition of the Lamson Store Service Company. The Court has power under s. 11 of the Companies Act, 1867, to confirm the resolutions for the

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reduction of the capital if it is satisfied that every creditor who is entitled to object has either consented or had his debts provided for. Under s. 13 (1) a list is to be settled of the creditors entitled to object; and to entitle them to object they must have debts which would be provable if the company were then wound up. Here there are no such creditors, and no settling of the list is necessary. Regulations for the settling of the list in chambers are prescribed by the General Order of March 21, 1868, in rules 6 to 14. By rule 24 power is reserved to the Court to give any direction as to the course of proceeding. Under that provision the settling of the list of creditors might in such a case as this be dispensed with.

Hastings, Q.C., and *J. H. Gregson*, for the petition of the National Reversionary Investment Company.

Cur. adv. vult.

Aug. 1. STIRLING J. referred to the facts, and continued:—The question is whether the order made by the chief clerk was a proper one. The petitions do not fall within s. 4 of the Companies Act, 1877, which provides that where the reduction of the capital of a company does not involve either the diminution of any liability in respect of unpaid capital, or the payment to any shareholder of any paid-up capital, the creditors of the company shall not, unless the Court otherwise direct, be entitled to object or required to consent to the reduction. The proceeding, therefore, must be conducted with regard to the provisions of the Companies Act of 1867, and the rules made thereunder. [His Lordship referred to the 13th section of the Act, and continued:—]

(1) 30 & 31 Vict. c. 131, s. 13: "Where a company proposes to reduce its capital, every creditor of the company who at the date fixed by the Court is entitled to any debt or claim which, if that date were the commencement of the winding-up of the company, would be admissible in proof against the company, shall be entitled to object to the proposed reduction, and to be entered in the list of creditors who are so entitled to object.

"The Court shall settle a list of such creditors, and for that purpose shall ascertain as far as possible without requiring an application from any creditor the names of such creditors and the nature and amount of their debts or claims, and may publish notices fixing a certain day or days, within which creditors of the company who are not entered on the list are to claim to be so entered or to be excluded from the right of objecting to the proposed reduction."

The language of the early part of the 2nd portion of that section is imperative—"the Court shall settle a list of such creditors"—and the chief clerk's order dispensing with that is, in my opinion, wrong in form, and ought not to have been made. The next portion of the section is also imperative: "and for that purpose shall ascertain as far as possible without requiring an application from any creditor the names of such creditors and the nature and amount of their debts or claims." To a certain extent that has, in the first case, been complied with, as there was evidence before the Court by which, though the forms required by the rules were not followed, it was to a certain extent ascertained that there were no creditors. The last part of the section appears to be not imperative, but directory only. Rules were made in 1868 which regulate the mode of conducting the proceedings in chambers. Those I take not to be imperative, but directory, and the Court has a discretion whether to require certain things to be done or not. The question is whether the orders made by the chief clerk being wrong in form are not wrong also in substance; and I do not think that, having regard to the objects of the reduction which I am asked to sanction by the petitions, either case is one in which I can say that the rules need not be complied with. The settling of the list of creditors seems to me to be a thing which is required by the Act, and in my judgment in both cases the rules ought to be followed. The matter must go back to chambers with directions to issue advertisements and settle the lists, according to the rules; and if necessary that may be proceeded with in the Vacation.

Upon the merits of the schemes I give no concluded opinion, as the matters may hereafter come before me for decision; but I may say that, as at present advised, I think that what is proposed to be done comes within the scope of the Acts.

Solicitors for the Lamson Store Service Company: *Harwood & Stephenson.*

Solicitors for the National Reversionary Investment Company: *Iliffe, Henley & Sweet.*

G. A. S.

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1895

Aug. 6, 10.

FARNHAM *v.* MILWARD & CO.

[1893 F. 1443.]

Practice—Parties—Action by Lunatic by his Committee—Lunatic adjudicated Bankrupt—Trustee in Bankruptcy added as Defendant to Action—Right of Trustee to have Action stayed as against him—Rules of the Supreme Court, 1883, *Order* XVI., *r.* 17; *Order* XXV., *r.* 4—*Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *ss.* 117, 120—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 132.

Where an action has been brought by the committee of a lunatic, and the lunatic is subsequently adjudicated bankrupt, the right of action vests in his trustee in bankruptcy; and if the trustee declines to prosecute the action he cannot be added as a defendant against his will. Where he has been so added he is entitled to have the action stayed as against him.

ADJOURNED SUMMONS.

This was a summons taken out by the defendant Norris, who had been added as a defendant by amendment of the writ, and was sued as the trustee in bankruptcy of the plaintiff William Farnham, asking that all proceedings in the action might be stayed as against the applicant on the ground that it was vexatious.

In 1893 the plaintiff W. Farnham was found a lunatic by inquisition; and on August 5, 1893, his wife, Mrs. Catherine Farnham, was appointed committee of his estate and effects. On September 7, 1893, the writ in this action was issued by the committee in her own name and in the name of the lunatic against the defendants Milward & Co., who had acted as the solicitors and confidential agents of the lunatic, claiming an account of all moneys received and paid by the defendants, Milward & Co., for or on his account, a receiver of all moneys come to the hands of the said defendants since June 6, 1893, damages, and costs. On November 17, 1893, an order was made upon motion directing that an account be taken of all sums of money received by or come to the hands of the defendants as the late agents and solicitors for the plaintiff William Farnham, and of all sums paid or advanced by the defendants to or for the use of the said plaintiff. On May 19, 1894, the plaintiff William Farnham was adjudicated bankrupt, and the defendant

Norris was, on May, 26, 1894, duly appointed trustee in his bankruptcy.

For some time after the adjudication in bankruptcy the proceedings in the action were suspended; but on April 23, 1895, an order was made by his Lordship in chambers, at the instance of the defendants Milward & Co., giving liberty to amend the writ by adding Norris as a defendant in the action, and directing that the taking of the accounts should be proceeded with. The writ was not finally amended until May 2. On June 15, 1895, the defendant Norris took out this summons; but in the meantime he had attended certain applications in chambers on the taking of the account.

R. J. Parker, for the applicant. The authority upon which your Lordship made the order in chambers was *In re Whatman.* (1)

[STIRLING J. I have sent for the registrar's note of the case of *In re Whatman.* (1)]

It is clear that a bankrupt cannot proceed with an action the cause of which has passed to the trustee: *Jackson* v. *North Eastern Ry. Co.* (2), *Warder* v. *Saunders* (3), *Selig* v. *Lion* (4), *Kellaway* v. *Bury* (5), and *Rochfort* v. *Battersby.* (6)

Willis Bund, for the defendants Milward & Co. My clients ought not to run the risk of having to account both to the plaintiff and to the trustee. The trustee was properly made a party to this action.

Hastings, Q.C., and *C. Church*, for the plaintiffs. The trustee is too late in this application. He has already attended some of the proceedings, and has asked for a statement of claim. The authorities cited do not apply to the case of a lunatic plaintiff. In *In re Farnham* (7) the Lords Justices expressed doubt as to whether a lunatic can be made a bankrupt; but, assuming that he could, they held that the trustee in bankruptcy could only take subject to the jurisdiction of the judge in Lunacy over the property under ss. 117 and 120 of the Lunacy Act, 1890.

(1) W. N. (1889) 213.
(2) 5 Ch. D. 844.
(3) 10 Q. B. D. 114.
(4) [1891] 1 Q. B. 513.
(5) 66 L. T. (N.S.) 599.
(6) 2 H. L. C. 388.
(7) W. N. (1895) 127.

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[STIRLING J. The Court in that case refused to part with property under its control until it was ascertained whether it would be required for the maintenance of the lunatic. That is different to the case of the trustee bringing an action in respect of a right which has passed to him.]

The jurisdiction in Lunacy is paramount, and the action ought to be allowed to proceed.

R. J. Parker, in reply. Delay may, no doubt, in some cases be a ground for refusing an application of this sort: Annual Practice (1895), p. 552; *Cross* v. *Earl Howe* (1); but here there has been no delay such as to preclude the applicant from relief. The writ was not finally amended until May 2, and the summons was taken out on June 15. In *In re Farnham* (2) the property was in court, and the trustee could not get it without applying to the judge in Lunacy, and the Lords Justices would not allow it to be taken out without imposing terms. They acted on the principle applied in cases where it is sought to enforce charging orders on property of a lunatic, such as *In re Plenderleith.* (3) The trustee does not seek to interfere with the jurisdiction of the judge in Lunacy. He does not ask to be made a plaintiff, but only that a sole plaintiff who is bankrupt may not be allowed to carry on the action, and put him in the position of a defendant. This Court is bound by the adjudication: Bankruptcy Act, 1883, s. 132. The trustee could deal with the subject-matter of the action in the bankruptcy. The property of a lunatic can be taken in execution, and on that ground a committee has been allowed to file a petition in bankruptcy in his name: *In re James* (4) and *In re Lee.* (5) That goes to shew that a lunatic may have property which is not subject to the Lunacy jurisdiction.

Cur. adv. vult.

Aug. 10. STIRLING J. stated the facts and continued:—On the accounts being proceeded with in chambers, an objection was raised by the defendants Milward & Co. that they were liable to be sued both in this action and by the trustee in the bankruptcy, and

(1) 62 L. J. (Ch.) 342.
(2) W. N. (1895) 127.
(3) [1893] 3 Ch. 332.
(4) 12 Q. B. D. 332.
(5) 23 Ch. D. 216.

they contended that the proceedings should not be continued without the trustee being made a party. He declined to prosecute the action; and then, the matter being before me in chambers, I was asked to allow the amendment of the writ by making Mr. Norris a defendant, and on the authority of *In re Whatman* (1), I thought that I was justified in giving leave to make the amendment. Now I am perfectly satisfied that I was wrong in giving that leave. In truth, I misread the account of that case in the *Weekly Notes*. I think I ought to have inferred from the report there that the order made in that case did not authorize proceedings such as I was asked to permit in the present case; and having had during the argument the registrar's book produced to me, I am satisfied that no such order was made. But for that authority, which I thought that in chambers I was bound to follow, I should not have allowed the amendment. On April 23, 1895, leave having been given, the trustee was added as a defendant; thereupon some correspondence took place between the solicitors of the plaintiffs and the solicitors of Mr. Norris, which continued down to May 2; and from that it is obvious to my mind that Mr. Norris' solicitors were groping about to discover on what ground he had been added as a defendant, and they pointed out that he should be sued as trustee in the bankruptcy, which had not at first been done, and that the writ ought to be amended by indicating the relief asked against him. The writ was finally amended on May 2, and then the correspondence closes. Subsequently the trustee was present at some applications at chambers, and on one which was adjourned to myself; but ultimately on June 15 he took out this summons, and the question is whether he is entitled to the order he asks for. It was admitted by counsel for the plaintiffs, that in the case of a sane plaintiff the defendant would be entitled to the order, and there can be no doubt that that would be so; but two questions were raised. First, it was said that the law as laid down by the Court of Appeal in *Jackson* v. *North Eastern Ry. Co.* (2) and other cases as applicable to the case of a sane bankrupt was not applicable in the case of a lunatic; and, secondly,

(1) W. N. (1889) 213. (2) 5 Ch. D. 844.

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that by reason of delay the trustee was precluded from the relief to which he would otherwise be entitled. Dealing with those objections, I must first consider the position of a lunatic where he sues in this Court. By Order XVI., r. 17, of the Rules of Supreme Court, 1883, it is prescribed: "Where lunatics and persons of unsound mind not so found by inquisition might respectively before the passing of the principal Act have sued as plaintiffs or would have been liable to be sued as defendants in any action or suit, they may respectively sue as plaintiffs in any action by their committee or next friend according to the practice of the Chancery Division, and may in like manner defend any action by their committees or guardians appointed for that purpose." Therefore, the practice which is now followed in the case of a lunatic plaintiff is the same as formerly existed in the Court of Chancery. The basis of that procedure, so far as it permitted a lunatic to sue by a next friend, was clearly stated by James L.J. in the well-known case of *Beall* v. *Smith* (1), and as it states a principle, I will read a few words from the judgment. He says (2): "The law of the Court of Chancery undoubtedly is that in certain cases where there is a person of unsound mind, not found so by inquisition, and therefore incapable of invoking the protection of the Court, that protection may in proper cases, and if and so far as may be necessary and proper, be invoked on his behalf by any person as his next friend"; and further on he says: "It is to be borne in mind that unsoundness of mind gives the Court of Chancery no jurisdiction whatever. It is not like infancy in that respect. The Court of Chancery is by law the guardian of infants, whom it makes its wards. The Court of Chancery is not the curator either of the person or the estate of a person non compos mentis, whom it does not and cannot make its ward. It is not by reason of the incompetency, but notwithstanding the incompetency, that the Court of Chancery entertains the proceedings. It can no more take upon itself the management or disposition of a lunatic's property than it can the management or disposition of the property of a person abroad, or confined to his bed by illness. The Court can only exercise such equitable jurisdiction as it

(1) L. R. 9 Ch. 85. (2) L. R. 9 Ch. 91.

could under the same circumstances have exercised at the suit of the person himself, if of sound mind."

That is a clear statement of the jurisdiction exercised by the Court in a case where a lunatic is the plaintiff, and though the remarks were directed to a case where a lunatic is suing by a next friend, they are equally applicable to a case where he is suing by a committee. There is a difference in the practice in the two cases, because from an early period it has been held that where a lunatic sues by a committee the proper practice is that the committee should be added as a co-plaintiff. That was laid down in *Fuller* v. *Lance* (1) in the reign of Charles II. The reason for the distinction, I apprehend, is this, that a committee being entrusted by law, under the authority of the Crown, with the care, management, and disposition of the lunatic's affairs, he is in a position to receive and give a good discharge for property recovered in an action brought by the lunatic, whereas a next friend, who simply intervenes and invokes the jurisdiction of the Court, would not be in a position to do so; but otherwise the principles which govern the procedure in actions brought by lunatics are the same in each case. It follows that the lunatic having been adjudicated a bankrupt, and that adjudication being binding on me, the right of action which at the commencement of the proceedings was vested in him has now by law become vested in the trustee; and though the committee may sue in the name of the lunatic and in his own name and enforce rights of action which are vested in the lunatic, I can find no authority, and on principle it seems to me to be wrong, that he should be permitted to enforce a right of action which by due process of law I assume to have become vested in some one else, and to have ceased to be the right of the lunatic. In substance, the committee has a right to protect the property and enforce the rights of the lunatic, but his functions cease when the property and rights are vested in some one else.

In support of the plaintiff's view, the case of *In re Farnham* (2), a case which arose in this lunacy, was cited; and a shorthand note of the judgments delivered by the Lords Justices has been furnished to me, and I have read and studied them to

(1) Ch. Cas., Part I., 18, 19. (2) W. N. (1895) 127.

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the best of my ability. The case was a remarkable one. Part of the property of the lunatic consisted of a considerable amount of plate which had been deposited in Court in the lunacy prior to the application which I am now about to mention. Being in court, the trustee, Norris, sought to have it delivered up to himself, on the ground that the legal title to it was vested in him. The question was raised, and left open, whether a lunatic could be adjudicated a bankrupt. The Lords Justices assumed for the purposes of their decision that the adjudication was valid, though they expressed some doubt on the subject. The way in which the case was dealt with is shewn by the judgment of Lindley L.J., who says: "Assuming that, Mr. Swinfen Eady says that everything follows in his favour and that the Court ought to direct this plate to be handed over to the trustee, but it has been pointed out, and I think very properly, that, inasmuch as this lunatic was adjudicated a bankrupt some time after he was found a lunatic by inquisition, the trustee in bankruptcy must take subject to the powers of the Judge in Lunacy conferred by the Lunacy Act, 1890; and the Lunacy Act, 1890, in ss. 117, 120, vests in or confers upon the Judge in Lunacy various powers, and, amongst others, the power to apply the estate of the lunatic in discharge of his debts; and although I believe it is perfectly well settled that a lunatic can be adjudicated a bankrupt under the direction of the committee acting under the order of the Judge in Lunacy, there is a question whether he can be validly adjudicated apart from that. Now, supposing that the trustee takes subject to the statutory powers, the main point in Mr. Eady's argument is answered, and I think Mr. Warrington was quite right in saying that whatever may be true of the actual vesting of the property in the trustee, it does not follow that the trustee may take the property which is so vested in him, except subject always to the jurisdiction which has accrued before the bankruptcy to the Judge in Lunacy under the inquisition. I think that is a good answer to his argument as far as that goes."

The Lords Justices did not dispute that the property and the legal right to it was vested in the trustee in the bankruptcy; but they laid down that they had, as it were, a higher power and could direct the application of the property. How far that may

apply here it is not for me to say; but I have read the sections of the Lunacy Act, 1890, which were referred to in the judgments, and the judgments themselves, with great care, and it does not seem to me that they go to this, that the committee can bring an action to assert a right which is vested in the trustee in bankruptcy of a lunatic. I do not think that it was intended that the decision should go so far as that; so it follows, to my mind, that the defendant Norris is, on principle, entitled to the order that he asks for.

It only remains for me to deal with the question of delay.

It must be borne in mind that the amendment was sanctioned by the judge in person, and the proceedings in the action had been sanctioned by the Master in Lunacy. The question raised is one of some novelty, and I think that under the circumstances the trustee has not come too late to obtain relief, and he should not be prejudiced, as far as obtaining relief goes, by his having attended the proceedings to settle the accounts. It may be that he would be precluded from raising the objection if it did not go directly to the root of the proceedings. The proceedings, however, are, in my opinion, entirely wrong, and can only be set right by making the trustee a co-plaintiff. He declines to allow that to be done; and I think that, under the circumstances, he is not too late, and his application should be acceded to, and the action stayed as against him; but, at the same time, I do not think that this is a case for giving any costs.

Solicitors: *Field, Roscoe & Co., for Deane & Hands, Loughborough; Spencer Whitehead; Prior, Church & Adams.*

G. A. S.

KEKEWICH J.

1895

June 19, 21; *July* 5.

In re MORLEY. MORLEY *v.* HAIG.

[1895 M. 1367.]

Life Policy—Tenant for Life and Remaindermen—Premiums—Mortgage Debt—Adjustment of Liability for Premiums and Interest.

Part of a testator's estate consisted of policies on the life of another, subject to a mortgage to the life assurance office. By his will he bequeathed his personal estate to one for life with remainders over. After the death of the testator his executor paid the premiums on the policies and the interest on the mortgage out of the income of the personal estate until the death of the assured, when the office paid to the executor the surplus of the policy moneys remaining after deducting the mortgage debt:—

Held, that, as between the tenant for life and the remaindermen, the amount of income expended in keeping down the premiums and interest ought to be recouped to the tenant for life, with interest at 4 per cent., out of the property preserved by the expenditure—that is, the surplus policy moneys; and that the balance of such surplus moneys must be apportioned between capital and income according to the principle and form of order in *In re Earl of Chesterfield's Trusts* (24 Ch. D. 643).

Robert George Morley was at the time of his death absolutely entitled to three policies of assurance on the life of Henry Ridley Ellington, effected in the Equitable Life Assurance Office, for sums amounting in the whole to 3500*l.*, subject to a mortgage to the office, on the largest of the three policies, for securing the repayment of 3000*l.* with interest at 5 per cent. per annum.

By his will, dated August 7, 1885, R. G. Morley, after certain specific bequests, devised and bequeathed his real and personal estate to trustees in trust for sale and conversion, with power to postpone such sale and conversion during such period as they should think proper, and in the meantime to expend out of the income or capital of his estate such money as they might think fit for premiums on policies or otherwise; and he directed his trustees to stand possessed of the proceeds of such sale and conversion upon trust, after payment of his funeral and testamentary expenses, debts, and legacies, to invest the same and pay four-twelfths of the net income to his wife during widowhood, and,

subject thereto, to stand possessed of the said trust premises and the net income thereof in trust for his children, the share of each son to bear to that of each daughter the proportion of five to three, the share of each daughter being settled upon her for life, with remainder to her children and remoter issue, with a clause of accruer to the testator's other sons and daughters in case of failure of the trusts of such daughter's share; and a moiety of the share of any son being settled upon him for life, with remainder to his wife and children, with a clause of accruer of such moiety to the testator's other sons and daughters in case of failure of the trusts of such moiety.

By a codicil the testator declared that the share of income of his residuary estate payable to his wife should be one moiety during her widowhood, and that, subject thereto, the trust premises and the income thereof should be divisible among his children in certain proportions therein specified in lieu of the proportions mentioned in his will.

The testator died on June 20, 1890, leaving his wife and four children—two sons and two daughters, all of whom attained twenty-one—surviving. The will was proved by one only of the executors. At the time of the testator's death the total surrender value of the three policies, subject to the mortgage debt and the interest due thereon to his death, amounted, less the mortgage debt and interest, to 3773*l.* 1*s.* 8*d.* The acting executor and trustee of the will did not sell the policies, but, to the advantage of the estate, retained them until the death of Ellington, the assured, which happened on March 14, 1895. From the death of the testator until the death of the assured the acting executor and trustee paid the premiums on the policies and the interest on the mortgage out of the income of the testator's estate. On May 10, 1895, the sum of 6015*l.* 17*s.* 9*d.* was paid to the executor and trustee in respect of the policies, being the balance remaining payable thereon after satisfying the principal and interest on the mortgage debt, amounting to 3077*l.* 17*s.* 3*d.*

This was a summons taken out by the widow and children of the testator against the executor and trustee to ascertain what were the relative rights of the several persons who were entitled

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to the income of the testator's residuary estate, and of the unborn and other persons entitled in remainder, to and in the 6015*l.* 17*s.* 9*d.* surplus policy moneys, and, in particular, whether the respective tenants for life were entitled to be recouped out of the said surplus policy moneys the amount applied in payment of the premiums and mortgage interest from the testator's death; and whether they, or any of them, were entitled to any and what compensation or equivalent for the income which they would have derived from the proceeds of sale or conversion of the testator's interest in the policy, had the same been sold or converted immediately after his death.

Renshaw, Q.C., and *Dauney*, for the plaintiffs, claiming as tenants for life. This case is not entirely covered by authority. We submit, however, that it is governed by the principles laid down in *In re Earl of Chesterfield's Trusts.* (1) There is in the present case this distinction, that at the death of the testator there was a mortgage existing on the policies. This mortgage was not paid off until the policy moneys fell in; and in the meantime the interest on the mortgage was kept down by the defendant, the executor and trustee, by payments out of income which would otherwise have gone to the plaintiffs. We submit that the plaintiffs are entitled to be recouped the sums so paid, with interest at 4 per cent. on each of such sums from the date of its payment. The defendant also paid the premiums on the policies out of income belonging to the plaintiffs. As to these sums there is no doubt, on the authority of *In re Chesterfield's Trusts* (1), that the plaintiffs are entitled to have those sums repaid to them with interest.

The question remains as to how the surplus policy moneys received by the defendant, and remaining after the above payments, are to be apportioned between the plaintiffs, the tenants for life, and the remaindermen. We submit that the proper mode of apportioning these surplus moneys is as follows: It should be ascertained what sums put out at the date of the death of the testator, and accumulated at 4 per cent. per annum compound interest with yearly rests, would produce, at the date the

(1) 24 Ch. D. 643.

policy moneys were received by the defendant, the sum so received, less payments for premiums and interest on the mortgage, and interest on such premiums and interest. The sum thus ascertained must be treated as capital, and the difference between that sum and the amount of the surplus policy moneys as income. This is following the order made in *In re Chesterfield's Trusts* (1), and we submit it is the proper order to be made in this case.

[The cases of *Wright* v. *Lambert* (2), *Beavan* v. *Beavan* (3), *In re Hobson* (4), *In re Flower* (5), and *In re Hengler* (6) were also referred to.]

Warrington, Q.C., and *E. W. Lavington*, for the defendant, the executor and trustee, as representing remaindermen. There seems to be no doubt that this case is governed by *In re Chesterfield's Trusts.* (1) The only distinction seems to be the existence of the mortgage in the present case, and the payments of mortgage interest. We submit that these payments should be made by the plaintiffs. The plaintiffs should, in fact, be put in the same position as if the mortgage had been paid off at the testator's death. If it had been then paid off, the plaintiffs would have received so much less income since the testator's death.

Renshaw, Q.C., in reply.

Cur. adv. vult.

July 5. KEKEWICH J. It is reasonably clear, and was conceded in argument, that the relative rights of the tenant for life and remaindermen must be adjusted according to the rule in *In re Earl of Chesterfield's Trusts.* (1) If, apart from the decision in *In re Hobson* (4), there remained any doubt respecting the applicability of that rule to a case like the present, that decision would wholly remove it. The rule is applicable to circumstances of considerable variety, as is illustrated by *In re Hengler* (6); and the real question in each case must be how to make it work justly between the parties interested according to the special facts.

(1) 24 Ch. D. 643.
(2) 6 Ch. D. 649.
(3) 24 Ch. D. 649, n.
(4) 55 L. J. (Ch.) 422; 53 L. T. (N.S.) 627; 34 W. R. 70.
(5) 62 L. T. (N.S.) 216.
(6) [1893] 1 Ch. 586.

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Here the special facts are that the reversionary interest in question was a policy subject to a mortgage, and that the interest in that mortgage, as well as the premiums on the policy, were from time to time paid out of the income to which the tenant for life would otherwise have been entitled. The mortgage itself has now been paid out of the money received under the policy, together with a small amount of interest which may be ignored, and we are dealing with the balance of the policy moneys remaining after discharge of the mortgage, and no more.

But for the necessity of making some special provision in respect of the interest and premiums, the application of the rule would be easy. One would calculate what sum, if invested at 4 per cent. interest at the date of the testator's death, would produce the amount of this balance, and that sum would be capital to be invested for the benefit of the estate, and the rest would belong to the tenant for life. In fact, however, the tenant for life has received year by year less than she was entitled to, by reason of part of the income having been taken to keep down the interest and premiums; and adjustment must now be made on the footing that these yearly sums ought to be recouped to her out of the money preserved by such expenditure—that is, the policy moneys. Of course, they ought to be recouped with interest; and I think that interest ought to be calculated at 4 per cent. I hesitate about the figures; but it is to be observed that I am here dealing, not with the rate which trustees with restricted powers of investment might have earned, but with the rate which an absolute owner, free to deal as she pleased, might have obtained for her money. These sums, therefore, will have to be deducted in her favour from the net policy moneys, and the balance must be apportioned between capital and income on the principle above explained. Except for the necessary subtraction, in the first instance, of the costs of these proceedings, the arithmetic might all be worked out in a schedule to the order; but, as it is, the order can only direct how the rule shall be applied to the yet unascertained sum which will remain after subtraction of the taxed costs from the existing balance, less the sums—which can be easily calculated—payable to the tenant for life on adjustment of capital and income accounts.

The operative part of the order was drawn up in the following form :—

"This Court doth declare that out of the sum of 6015*l.* 17*s.* 9*d.* in the hands of the defendant as the trustee of the will and codicils of the testator, and representing the surplus, after paying off the mortgage for 3000*l.* and interest mentioned in the summons, of the moneys which became payable under the three policies of assurance in the Equitable Life Assurance Office on the life of Henry Ridley Ellington which are referred to in the said summons and are more particularly mentioned in the said affidavit of, &c., there ought to be recouped to the tenant or tenants for life under the said will the several sums paid or applied as mentioned in par. 12 of the said affidavit out of the income of the testator's estate after his death in payment of interest on the aforesaid mortgage for 3000*l.* and of premiums on the aforesaid policies, with interest at the rate of 4*l.* per cent. per annum on such several sums from the respective dates when the same were so paid or applied to May 10, 1895, the day on which the said policy moneys were received by the defendant.

"And this Court doth declare that thereout also there ought to be paid the costs of the plaintiffs and defendant hereinafter directed to be taxed.

"And this Court doth declare that the residue of the said policy moneys is apportionable between principal and income by ascertaining the sum which, put out at 4*l.* per cent. per annum on June 20, 1890, the day of the death of the testator, and accumulated at compound interest calculated at that rate with yearly rests and deducting income tax, would, with the accumulations of interest, have produced on the said May 10, 1895, the amount of such residue; and that the sum so ascertained should be treated as corpus or principal of the said testator's estate and be applied and dealt with accordingly, and that the balance of such residue should be treated as income.

"And it is ordered that it be referred to the taxing master to tax, as between solicitor and client, the costs of the plaintiffs and the defendant on this application, including in the costs of the defendant, the trustee, his costs, charges and expenses of ascertaining by the employment of an actuary the relative amounts of principal and income as aforesaid, and any costs, charges and expenses properly incurred by him relating to this application.

"And it is ordered that the defendant deal with and apply the said sum of 6015*l.* 17*s.* 9*d.* according to the foregoing declaration."

Solicitor: *C. W. Dommett.*

G. I. F. C.

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July 31.

LLOYD *v.* NOWELL.

[1894 L. 2633.]

Vendor and Purchaser — Contract — Memorandum — Preparation of formal Contract — Condition precedent — Waiver of Condition.

A vendor and purchaser signed a memorandum purporting to be an agreement for the sale and purchase of a house at a stated price, "subject to the preparation by the vendor's solicitor and completion of a formal contract":—

Held, that the vendor could not waive that stipulation as being intended for his benefit alone, so as to constitute the rest of the memorandum a final contract enforceable against the purchaser.

Hawksley v. *Outram* ([1892] 3 Ch. 359) distinguished.

THIS was an action by a vendor against a purchaser for specific performance of an alleged agreement for the sale of a leasehold house, 365, Camden Road.

The alleged agreement was by a memorandum in writing in the following terms:—

"365, Camden Road,
"November 1st, 1894.

"Subject to the preparation by my solicitor and completion of a formal contract, I am willing to sell to you Lease of 365 Camden Road for a term of twenty-eight years at a rent of 110*l.* per annum, you paying me 500*l.* premium for same and also paying the cost of new lease.—100*l.* paid (and receipt hereby acknowledged) as conditional deposit. The balance to be paid 1st day of January, 1895, and possession given on completion. Plants and conservatory flowers to be included in price named.

"E. Lloyd.

"Accepted.
"Jos. D. Nowell.
"Witness, George Squire Boutall."

The purchaser having repudiated the contract, the vendor brought this action.

The defendant counter-claimed for the return of the 100*l.* deposit.

The action now came on for trial.

The question was whether a final and complete contract had been established by the memorandum.

Warrington, Q.C., and *G. Henderson*, for the plaintiff. If the introductory part of the memorandum—"subject to the preparation by my solicitor and completion of a formal contract"—is an essential part of the contract, then we must admit that there is no such final and concluded contract as can be enforced: *Rossiter* v. *Miller*. (1) But we submit we can waive it as being a condition in favour of the vendor: *Hawksley* v. *Outram*. (2) Then there is a contract complete in all its parts.

Renshaw, Q.C., and *Beddall*, for the defendant. The vendor has himself introduced a term into the contract making it entirely dependent upon (*a*) the "preparation" of a formal contract, a thing which the vendor is to do, and (*b*) the "completion" of a formal contract, a thing which the purchaser is to do. The stipulation is a condition precedent. Again, the deposit is itself "conditional." Accordingly, we have here "particulars essential to the agreement still remaining to be settled afterwards," and therefore, according to *Rossiter* v. *Miller* (3), there is no contract, the parties being still only in negotiation.

[They were stopped by the Court.]

KEKEWICH J. Lord Blackburn summarises the law applicable to these cases with his usual accuracy in the following passage of his speech in *Rossiter* v. *Miller* (4): "I think the decisions settle that it is a question of construction whether the parties finally agreed to be bound by the terms, though they were subsequently to have a formal agreement drawn up."

The question here is not whether this agreement was made subject to anything being done, but whether the stipulation is of the essence of the contract, the point being whether the vendor may waive it as being a provision intended solely for his own benefit; and upon that reference was made to *Hawksley* v. *Outram*. (2) But in that case there was a clause in restraint of

(1) 3 App. Cas. 1124, 1151.
(2) [1892] 3 Ch. 359.
(3) 3 App. Cas. 1151.
(4) Ibid. 1152.

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trade introduced into a contract which was executed by the attorney of one of the vendors, and it was held by Romer J., and not contradicted by the Court of Appeal, that that clause was ultra vires the attorney. The Court of Appeal thought that those for whose protection the term was inserted might waive it. There could be no doubt in that case for whose benefit the term was inserted, being a condition on the sale of a business whereby the vendors agreed not to carry on a similar business within a certain radius. That was solely for the benefit of the purchaser and not of the vendor, and that was why the waiver was allowed. How can I conclude that "the preparation by my solicitor and completion of a formal contract" is necessarily a term for the benefit of the vendor alone? We are all familiar with the advantage of a formal contract, an advantage intended, no doubt, mainly for the vendor as enabling him to preclude inquiries which may cause considerable delay and expense, although the title is good. But a formal contract is not solely for the advantage of the vendor: it may be also for the advantage of the purchaser to have the position defined. But I may look at the case from another point of view, which I take from the same page of Lord Blackburn's speech in *Rossiter* v. *Miller*. (1) He says: "Parties often do enter into a negotiation meaning that, when they have (or think they have) come to one mind, the result shall be put into formal shape, and then (if on seeing the result in that shape they find they are agreed) signed and made binding; but that each party is to reserve to himself the right to retire from the contract, if, on looking at the formal contract, he finds that though it may represent what he said, it does not represent what he meant to say." It seems to me that in the present case it may well have been intended that both vendor and purchaser should have the opportunity of seeing whether the formal contract was according, not so much to what they said, as to what they meant to say. I cannot myself get out of the plain meaning of the words: "I am willing to sell, not absolutely, but subject to the preparation by my solicitor, and completion, of a formal contract." What does that mean? It means that "provided my solicitor prepares a formal

(1) 3 App. Cas. 1152.

contract, and it is otherwise completed, then I will sell." That provision seems to me to go to the root of the contract, and not to be such a stipulation as the vendor may waive, for the purpose of insisting on performance of the contract without it.

On these grounds I give judgment for the defendant on the claim with costs, and judgment for the defendant on the counter-claim for the return of the 100*l.* deposit, with costs.

Solicitors: *W. Negus; Taylor & Taylor.*

G. I. F. C.

In re WRIGHT.
KIRKE *v.* NORTH.

[1895 W. 1459.]

Practice—Payment into Court—Admissions—Motion by some Plaintiffs only—Parties—Joinder—Discretion of Court in Orders on Admissions—Rules of Supreme Court, 1883, *Orders* XVI., *rr.* 1, 11; XVIII., *r.* 6; XXXII., *r.* 6.

A motion under Order XXXII., r. 6, for an order against a defendant on admissions of fact must be made by all the plaintiffs in the action, and not merely by some of them.

Accordingly, where, in an action by a tenant for life and the reversioners under a settlement against the trustees to make good a breach of trust, the reversioners alone moved under the above rule for an order on one of the defendants to pay capital moneys into court on admissions, the Court refused to entertain the motion in the absence of the tenant for life.

The practice as to joinder of parties considered.

An order on admissions is not a matter of right, but is in the discretion of the Court.

THIS action was brought by Mrs. Kirke, a widow, as tenant for life under her marriage settlement, and her children—of whom all but one were infants—as reversioners, against the defendant William George North, who was the executor and legal personal representative of John Wright, deceased, one of the two trustees of the settlement, and also against the surviving trustee, to make good certain sums alleged to have been lent by the trustees in a manner not in accordance with the trusts. The defendant North, whose testator appeared to have been the principal acting trustee of the settlement, put in a defence alleging (among other things) that the sums in question had been lent

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with the knowledge and consent of Mrs. Kirke. He, the defendant, had also himself brought an action (*North* v. *Kirke*) against Mrs. Kirke and others to recover the trust moneys so lent, and to have Mrs. Kirke's life interest impounded. The plaintiffs, the reversioners, in the present action of *Kirke* v. *North*, now moved that the defendant North might be ordered to pay the trust moneys into court to the credit of the action on the ground that, in his defence to the action and also in his statement of claim in *North* v. *Kirke*, he had admitted that the moneys had been in the hands of his testator, Wright.

A preliminary objection was taken that Mrs. Kirke, the tenant for life, should have been joined with the other applicants on the motion.

Renshaw, Q.C., and *Hadley*, for the defendant, North, in support of the objection. An application in an action cannot be made by some of the plaintiffs independently of the others: they must all concur: *Brown* v. *Sawer* (1); *Butlin* v. *Arnold*. (2)

Marten, Q.C., and *Boome*, for the applicants. The cases cited are under the old practice. Under the present practice one or more plaintiffs may apply for and obtain relief, and no cause or matter shall be defeated through the non-joinder of parties: Rules of Supreme Court, 1883, Order XVI., rr. 1, 11; Order XVIII., r. 6. Order XXXII., r. 6, is express that "any party may at any stage of a cause or matter, where admissions of fact have been made, either on the pleadings, or otherwise, apply" for and obtain an order on such admissions.

KEKEWICH J. I think this preliminary objection must prevail.

In construing the rules of procedure in this Division of the High Court we have to regard the former settled practice of the Court of Chancery. The two cases cited by Mr. Renshaw prove conclusively what the practice of the Court was. The question is, Has the new procedure altered that practice?

Now, the rule which seems to me to point in words more strongly than any other in Mr. Marten's favour is rule 6 of Order XXXII.: "Any party may at any stage of a cause or

(1) 3 Beav. 598. (2) 1 H. & M. 715.

matter"; that certainly in words, without going further, points to any plaintiff or any defendant applying; but on reading the rule through it will be seen that there is a necessary limitation: "Any party may at any stage of a cause or matter, where admissions of fact have been made." Therefore, to come within that rule, you must have a case where admissions have been made by the party against whom the application is made—admissions in favour of the party who is making the application; and that is more apparent when, a little further on, you find, "Without waiting for the determination of any other question between the parties." It seems to me that to construe the rule as meaning that any one of the plaintiffs may apply as against any one of the defendants, is to construe it far more widely than the language will properly bear, even without regard to the old practice.

Rule 6 of Order XVIII. does not, I think, affect the case at all. It says, "Claims by plaintiffs jointly may be joined with claims by them or any of them separately against the same defendant." The real object of that rule is merely to get rid of the enormous mischief under the old practice of misjoinder; and that is evident from the fact that Order XVIII. is headed, "Joinder of causes of action." Rule 11 of Order XVI. really deals with the same point. It says, "No cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties."

Then, falling back on rule 1 of Order XVI., we come, no doubt, to a most useful amendment—one which I know, from my own experience, to be of the very greatest advantage to suitors, for it enables the Court to do justice at the trial or judgment. It commences in a general way: "All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative." That is a beneficial rule; and enables the Court, when the action comes to trial, so to model the judgment as to do justice between the parties. I have had several cases in which Order XVI. has been applied. One of them was a case in which a mother and daughter made claim against trustees for a breach of trust. The daughter was an infant at the date of the breach of trust, and it was admitted that there was no

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defence whatever as against her. As against the mother, it was said, and said truly, that she had been an inciting party, and that the breach of trust was committed at her request, with the result that the relief sought by the daughter was made to fall on the mother, the proper shoulders. Under the old practice the Court would, unfortunately, have been obliged to dismiss that action, and the infant would not have had the benefit of it, because, joined with her mother, she could not have brought the action. As it was, she was able to bring the action. That is the meaning of the rule, but it is not meant that the parties should be joined together in a slipshod manner, and then applications should be made one against the other, confusing the pleadings and the issues.

Marten, Q.C., then applied for, and obtained, leave to amend the notice of motion by adding Mrs. Kirke as one of the applicants; and the motion was proceeded with on the footing of that amendment.

After hearing the arguments in support of the motion, his Lordship said that, so far as he understood the authorities as to orders on admissions, such as *Porrett* v. *White* (1) and other earlier reported cases, the obtaining of such an order was not a matter of right, but was a matter for the exercise of a judicial discretion, regard being had to all the circumstances of the case. In the present case the defendant, North, had raised various defences to the action, and said that, being an unimpeachable executor, he desired to administer his testator's estate according to due course of administration, and not to pay into court money which, or a large part of which, according to his view, belonged to the estate. That was a question to be tried; and, having regard to the inconvenience of deciding a question of this kind on motion, his Lordship held that, in the exercise of his judicial discretion, he ought not to make an order for payment into court. The motion must, therefore, be refused, but the costs would be reserved.

Solicitors: *Swann & Co., for Tweed & Son, Horncastle; Oldman, Clabburn & Co., for Willders & Son, Holbeach.*

(1) 31 Ch. D. 52.

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WILLIAMS *v.* QUEBRADA RAILWAY, LAND AND COPPER COMPANY.

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1895 Aug. 7.

[1894 W. 2766.]

Practice—Discovery—Production of Documents—Fraud, Charge of—Solicitor and Client—Privilege—Inspection by Judge—Rules of Supreme Court, 1883, *Order* XXXI., *r.* 19A, *sub-r.* 2.

Where fraud is alleged against a defendant, communications between himself and his solicitor as to the subject-matter of the alleged fraud are not privileged from production, there being no distinction in this respect between a crime and a civil fraud; and it is immaterial for this purpose whether the solicitor is or is not a party to the alleged fraud.

Reg. v. *Cox* (14 Q. B. D. 153) considered.

The practice as to inspection by the judge himself, under Order XXXI., r. 19A., sub-r. 2, of documents for which privilege is claimed, discussed.

THIS was an action by John Williams on behalf of himself and all others the holders of debentures and debenture stock in the Quebrada Railway, Land and Copper Company, Limited, to enforce their securities.

In 1883 and 1885 the directors of the company passed resolutions for the creation and issue of 6 per cent. debenture stock constituting a first charge, by way of a floating security, upon the undertaking and property of the company, and the stock was issued accordingly.

In 1886 the company, with the consent of the debenture stock-holders, created and issued 6 per cent. "prior mortgage debentures," charged, also by way of a floating security, in priority to the debenture stock, upon the company's undertaking and property.

The company made default in payment of the interest due on both the debentures and debenture stock on September 1, 1894, and on September 3 this action was commenced. The plaintiff delivered a statement of claim alleging that on February 22, 1894, an agreement was entered into between the company and Messrs. Matheson & Co., the sole consignees and agents for the sale of the company's ores, whereby the company purported (without disclosing the existing charges) to charge all their

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property with a large sum of money alleged to be due from them to Messrs. Matheson & Co. in the agency transactions. With reference to that agreement paragraph 22 of the statement of claim alleged as follows: "When the last hereinbefore stated agreement was entered into the company was insolvent, and its stoppage was, to the knowledge of the parties, imminent, and the charge created by the said agreement was not given in the ordinary course of business or for the purpose of enabling the company to continue its business, but to defeat and delay the holders of debentures and debenture stock, and the said agreement is utterly void, or, in the alternative, the charge thereby created is subject, as to all the property therein comprised, to both the debentures and the debenture stock."

Messrs. Matheson & Co. were joined with the company as defendants to the action, which claimed declarations to establish the priority of the debentures and debenture stock over Messrs. Matheson & Co.'s agreement of charge; also to have both classes of debenture securities enforced; and to have the agreement set aside.

In October and November, 1894, resolutions were passed by the company for a voluntary winding-up and liquidators were appointed.

In the course of the proceedings the liquidators filed an affidavit of documents, but as to a portion of them paragraph 2 of the affidavit stated as follows: "The said defendant company object to produce for inspection certain portions of the minute and agenda books comprised in the first part of the first schedule hereto, on the ground that they contain matters not relevant to the matters in question in this action, and also such other parts of the said minute and agenda books which contain copies of or extracts from counsel's opinions and the defendant company's solicitor's advice on matters on which the defendant company required and obtained opinions and advice. The said defendant company also object to produce the documents comprised in the second part of the said first schedule, on the ground that, other than so far as they consist of such parts of the minute and agenda books as last aforesaid, they are papers which have at different periods been submitted to counsel to advise the com-

pany upon their affairs before action brought, and also comprise papers submitted to counsel during the progress of this action for the purpose of his advising the defendant company and their solicitors for the purpose of obtaining their advice, and are therefore privileged."

The plaintiff then took out this summons for the production and inspection of the documents mentioned in paragraph 2 of the liquidator's affidavit.

A. R. Kirby, for the plaintiff. Our statement of claim distinctly charges the defendant company with fraud: and privilege cannot be claimed where fraud is charged: *Reg.* v. *Cox.* (1) No distinction can be drawn for this purpose between a fraud and a criminal charge: it is no part of a solicitor's duty to advise his client in the commission of a fraud any more than of a crime, and his papers are no more privileged in the former case than in the latter. And whether the solicitor knows or does not know that his client is seeking advice to guide him in the commission of a crime or fraud is immaterial: either case is outside the rule as to privilege altogether.

Moreover, our application here is for production by a liquidator; and, as a liquidator is an officer of the Court, it is his duty to produce all documents in his possession to either party.

Rowden, for the defendant company. Privilege extends to all communications between a party and his solicitor, although ante litem motam: *Minet* v. *Morgan* (2); and the circumstance that these opinions were taken at the time of the impeachment of the agreement of February 22, 1894, does not take them out of the rule as to privilege. Then, as to the argument that fraud has been alleged and therefore the rule as to privilege does not apply: paragraph 22 of the statement of claim, which is said to be an allegation of fraud, is an allegation of a very mild character. In fact it is not sufficient to constitute a charge of fraud, and it falls far short of the cases in which it has been held that a charge of fraud prevents privilege. No doubt, where a solicitor is party to a crime, a co-conspirator with his client, no privilege attaches, but it seems that does not apply to

(1) 14 Q. B. D. 153. (2) L. R. 8 Ch. 361.

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a civil fraud: Bray on Discovery, pp. 352–3. *Reg.* v. *Cox* (1) was a criminal case, and so was *Reg.* v. *Orton* (2) there cited. There is no charge here of the defendants' solicitors being a party to the alleged fraud, and therefore no discovery can be required of the solicitors: *Charlton* v. *Coombes.* (3) To take the case out of the ordinary rule as to privilege a special case of fraud must be made in the statement of claim, and no such special case is made here: *Follett* v. *Jefferyes* (4); *In re Postlethwaite.* (5)

The argument as to the duty of a liquidator to produce documents has no application to creditors who are outside the winding-up.

[KEKEWICH J. Have you any objection to my seeing the documents the production of which is objected to?]

No.

[KEKEWICH J. I do not think I can insist on seeing them if you object. Looking at the language of sub-r. 2 of r. 19A of Order XXXI. (Rules of Supreme Court, 1883), my present impression is that the "validity of the claim of privilege" here depends, not on the fraud, but on the charge of fraud. In my opinion, there is a clear charge of fraud, and it appears to me that the claim of privilege is invalid.]

Kirby, in reply. I am quite willing that your Lordship should see the documents.

The various documents, the production of which was objected to, were then handed up to his Lordship.

KEKEWICH J. This case is, in my opinion, one of unusual gravity and importance. It is of the highest importance, in the first place, that the rule as to privilege of protection from production to an opponent of those communications which pass between a litigant, or an expectant or possible litigant, and his solicitor should not be in any way departed from. However hardly the rule may operate in some cases, long experience has shewn that it is essential to the due administration of justice

(1) 14 Q. B. D. 153.
(2) Cited 14 Q. B. D. 162, 170.
(3) 4 Giff. 372.
(4) 1 Sim. (N.S.) 3, 15.
(5) 35 Ch. D. 722, 724–5.

that the privilege should be upheld. On the other hand, where there is anything of an underhand nature or approaching to fraud, especially in commercial matters, where there should be the veriest good faith, the whole transaction should be ripped up and disclosed in all its nakedness to the light of the Court.

It is said this case is not one of fraud. Shortly it is this. The plaintiff and those he represents are the holders of debentures and debenture stock of the defendant company. They say, "We have a first charge on the property of the company, and our first charge is obstructed by another charge given by the defendant company in favour of their agents, but really with the intention to defeat and delay our security. Ours is a floating security, not to come into effect—that is, not to come into activity—until certain circumstances take place, including a winding-up of the company." Then it is alleged that the company was insolvent, and that they found it useless for them to continue to carry on business and they had to stop, but that in order to prevent for a time this inevitable result they gave a charge in favour of their agents, and, as the plaintiff alleges, they did it in such a way as to defeat the holders of first debentures. That is what I understand the plaintiff's case to be, and it is said that is not a charge of fraud. It is difficult to say it is not commercial dishonesty. It is, in my opinion, commercial dishonesty of the very worst type; and that is fraud.

Then the company, which is now in liquidation, makes, by its liquidators, an affidavit of documents, including minute-books, and it appears that the company have in their minute-books, not only a minute of a resolution passed by the board of directors as to this charge, but copies of or extracts from the opinions of counsel and advice of the company's solicitors with reference to this charge; and they say they are not bound to produce these because they are confidential communications between them and their legal advisers which ought to be protected from production. It is obvious that, if this objection holds good, justice may be defeated; but it may be right that justice in this case should be defeated in order to uphold the general administration of justice. But is it right that justice should be defeated in this case? It is said that, this being a case of fraud,

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it is taken out of the ordinary rule, and that no protection can be claimed, on the ground of privilege, in a case which is one of fraud. The case of *Reg.* v. *Cox* (1) is referred to, and there, after full argument, the judgment of the Court for Crown Cases Reserved, consisting of Lord Coleridge C.J., and Hawkins, Stephen, Watkin Williams, and Mathew JJ., was delivered by Stephen J. It was a considered judgment going into the whole law upon the subject: and it goes the length of saying that it is a principle established by many cases that, where there is a charge of fraud, the protection of confidential communications between a client and his solicitor on the ground of privilege is not allowed. But it is argued that that was a criminal case, and that in civil cases the rule has been laid down only where there is something more than a charge of fraud against the defendant—where, for instance, the solicitor or attorney to the defendant has himself been a party to the fraud; and, no doubt, there are many passages to that effect to be found in the authorities, besides the passage that has been read from Mr. Bray's exceedingly useful book on Discovery; but I do not find that passage upheld by the judgment in *Reg.* v. *Cox.* (1) No doubt, also, the case of *Reg.* v. *Orton* (2), cited in that case, in which Cockburn C.J. gave an elaborate judgment, was a criminal case, but the judgment in *Reg.* v. *Cox* (1) is based on general principles, and does not draw any distinction between a case of crime and a case of civil fraud; and certainly, in *Reg.* v. *Orton* (2) Cockburn C.J. said nothing to lead to the conclusion that to oust the privilege the attorney must be a party to the fraud. A fraudulent person intending to commit a fraud would take great care not to let his solicitor know of the fraud if he could possibly avoid doing so: his object would be to deceive his solicitor as well as everyone else. In such a case, as Cockburn C.J. said, "If the client had a dishonest purpose in view in the communication he makes to his attorney with the view of making the attorney the innocent instrument of carrying out the fraud, it deprives the communication of the privilege." If, in such a case as that, privilege attached to the communication, justice would be very easily defeated.

(1) 14 Q. B. D. 153. (2) Cited 14 Q. B. D. 170–1.

In my opinion, the observations of Stephen J. apply to a case where the solicitor to the party charged with fraud is not himself charged with being a party to the fraud. It appears to me that the case of *Reg.* v. *Cox* (1) is applicable to civil as well as criminal cases. In *In re Postlethwaite* (2), where *Reg.* v. *Cox* (1) was considered, North J. refers to the judgments of Lord Cranworth in *Follett* v. *Jefferyes* (3), and of Turner V.-C. in *Russell* v. *Jackson* (4), and says (5): "Both those cases are of very high authority, and they both received the approval of the full Court for Crown Cases Reserved in *Reg.* v. *Cox.* (1) It seems to me, therefore, that if the case alleged by the statement of claim be true, there can be no professional privilege for the documents in question."

I was extremely reluctant to order the production of these documents without knowing something about them. It might be that, after all, privilege had not been aptly claimed, or I might inadvertently and unfairly to the defendants make them produce a number of documents which could only be used for the purpose of harassing them, and might have no direct bearing on the matters in question; and therefore I endeavoured to fall back upon the rules.

Sub-rule 2 of r. 19A of Order XXXI. says this: "Where on an application for an order for inspection privilege is claimed for any document, it shall be lawful for the Court or a judge to inspect the document for the purpose of deciding as to the validity of the claim of privilege." The old practice that existed long before the Judicature Acts on the Common Law side was always for the judge to take the documents and determine for himself whether they should be produced or not. That was occasionally done also on the Equity side. I remember one case in which an important document was produced to the Master of the Rolls in order that he might say whether it ought to be produced to the other side or not; and I also know, of my own experience, that the late Sir James Hannen always insisted on seeing documents in Probate actions. My difficulty was whether

(1) 14 Q. B. D. 153.
(2) 35 Ch. D. 722.
(3) 1 Sim. (N.S.) 3.
(4) 9 Hare, 387.
(5) 35 Ch. D. 726.

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I could insist on seeing the documents in question here, because the rule says "for the purpose of deciding as to the *validity* of the claim of privilege," and I had already made up my mind that the claim of privilege was invalid. I wished to see them because I wished to stop, if I could, the production of useless documents the production of which would only harass and do no good, but would only cause trouble and costs. Mr. Rowden assented to my seeing them. I have seen them, and I have come to the conclusion that the plaintiff's counsel must have an opportunity of looking at them. That they are relevant is perfectly clear to my mind, but whether they support the plaintiff's charge of fraud I will not say. I ought not to express any decided opinion whether they do or do not, but I do say that they require the closest investigation on behalf of the plaintiff. Therefore there must be an order in the usual form for the production and inspection of these documents, and the defendants, having been unsuccessful, must pay the costs of this application in any event.

Solicitors: *Ashurst, Morris, Crisp & Co.; Henry Kimber & Co.*

G. I. F. C.

In re COMMON PETROLEUM ENGINE COMPANY.

ELSNER AND McARTHUR'S CASE.

ROMER J.

1895

July 1, 8; *Aug.* 5.

[00296 of 1894.]

Company—Winding-up—Contributory—Contract for paid-up Shares—Registration of Contract—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.

A contract need not, in order to comply with s. 25 of the Companies Act, 1867, be made directly between the allottee of the shares and the company the shares of which are to be issued; and it need not shew on the face of it which particular shares are to be allotted, although the onus lies on the allottee to shew that his shares are within the registered contract.

It was agreed in writing between the S. Company and a trustee for the C. Company (then being formed) that the latter company should purchase from the former certain patent rights, the consideration to be shares in the C. Company or cash. The C. Company was to allot to every shareholder in the S. Company who should apply for the same shares of 1*l.* each in the C. Company, with 19*s.* per share credited as paid up in respect of shares held by the applicant in the S. Company. The C. Company when incorporated adopted the agreement by executing a deed thereon indorsed. The agreement and deed having been filed with the Registrar of Joint Stock Companies, E. and M., who were not shareholders in the S. Company, but nominees of shareholders entitled to shares in the C. Company, applied for and were allotted shares in the C. Company, and on paying 19*s.* per share were registered as holders of fully paid shares:—

Held, that s. 25 of the Companies Act, 1867, had been complied with.

In re New Eberhardt Co. (43 Ch. D. 118) distinguished.

THE Common Petroleum Engine Company, Limited, below called "the new company," was incorporated on March 17, 1892, one of its objects being to adopt and carry out a contract dated February 15, 1892, and made between Spiel's Patent Petroleum Engine Company, Limited (below called Spiel's Company), of the one part, and J. Elsner as trustee for the new company (then intended to be but not yet incorporated) of the other part, for the purchase of an invention and patent rights for improvements in gas, petroleum, and other hydro-carbon motors.

The capital of the new company was 20,000*l.* in 1*l.* shares, and its memorandum stated that 2550 shares, numbered 8 to

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2557 inclusively, might be issued as fully paid pursuant to the contract above mentioned, and that 17,443 shares, numbered 2558 to 20,000 inclusively, or any part thereof, might be allotted or issued with 19*s.* per share credited as paid up thereon respectively.

Art. 4 of the articles of association provided for the issue of the shares to the members of Spiel's Company, so as to free the holders from liability beyond 1*s.* per share. Art. 5 stated that, subject to the agreement and to art. 4, the shares might be issued on such terms as the directors should determine.

By the contract Elsner, as trustee for the new company, agreed that it should purchase from Spiel's Company the exclusive benefit of the invention.

By clause 2, "The consideration for the said sale shall be the sum of 2550*l.*, which shall be paid and satisfied by the issue to Spiel's Company or their nominees of 2550 fully paid shares of the new company of 1*l.* each, such shares to be numbered in the books of the new company, and in the share certificates for the same, 8 to 2557 inclusive, or at the option of the new company, as to the whole or any part of the said sum of 2550*l.*, by payment in cash in lieu of shares. The new company shall allot and issue to every shareholder in Spiel's Company who shall be willing to accept and shall apply for the same, three shares of 1*l.* each of the new company credited with the sum of 19*s.* as paid up on each of the shares so to be allotted and issued in respect of every two shares of 5*l.* each held by him in Spiel's Company, and such shares of the new company so to be allotted and issued as last aforesaid shall be numbered in the books of the new company, and in the share certificates of the same, 2558 to 20,000 inclusive. Every such shareholder in Spiel's Company shall apply for such shares in the new company within the time limited by notice to be given to him of his right to apply for and accept the same, and shall undertake in writing to pay up the 1*s.* per share remaining unpaid on such shares, either prior to or at the time of the allotment and issue of such shares to him, or by such instalments and at such times as may be fixed for the payment of the same. If any such shareholder who may so apply for shares as aforesaid shall hold an odd number of shares in

Spiel's Company, he shall only have the right to apply for and have allotted and issued to him in respect of such odd share one share of the new company of 1*l.* so credited as aforesaid. All of the said shares of the new company not applied for by shareholders in Spiel's Company within the time so limited as aforesaid may be sold when and to such persons and on such terms, or may be otherwise dealt with, by the new company as the new company may think fit."

By clause 3 the purchase of the said premises was to be completed on March 15, 1892, when the purchase price was to be paid and satisfied in manner above mentioned, and thereupon Spiel's Company and all other necessary parties were to execute the necessary conveyances.

By clause 4 this contract or some other proper and sufficient contract was to be filed with the Registrar of Joint Stock Companies before the issue of any of the above shares under the contract, and by clause 5, in consideration of the purchase price, Spiel's Company were to pay all costs of bringing out the new company.

This contract was executed by two directors of the new company affixing the seal of the new company to it, and by Elsner.

By an indenture of March 19, 1892, indorsed on the contract, and made between Spiel's Company of the first part, Elsner of the second part, and the new company of the third part, it was witnessed that, in pursuance of the contract and to give effect thereto, the new company ratified and adopted the contract, and declared the same to be binding on the new company as if it had been incorporated before the date of the contract and had entered into it instead of Elsner. This indenture was executed by the parties thereto. The indenture and indorsement were the only contracts registered prior to the issue or allotment of shares.

By an indenture of March 30, 1892, after reciting an agreement that the purchase-money should be paid as to 350*l.* in cash, and as to the rest in shares, Spiel's Company assigned the property to the new company in consideration of the purchase-money.

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Elsner and McArthur applied, in their own names, for 250 and 50 of the shares in the new company, with 19*s.* per share credited as paid, and the same were duly allotted to them on March 23, 1892. Neither the application nor the allotment referred to any registered agreement. McArthur's application was made on one of the forms, which had been sent only to shareholders in Spiel's Company, and Elsner's application was made on a form referring to "extra shares," i.e. shares which had not been taken up by shareholders in Spiel's Company. This form was only sent to shareholders. Neither McArthur nor Elsner was a shareholder in Spiel's Company, but both applied for shares as nominees of persons who were shareholders. and entitled to exercise the option given by clause 2 of the contract. The names of Elsner and McArthur were placed on the register of shareholders as holders of fully paid shares, They only paid 1s. each per share in cash. Both received certificates for fully paid-up shares.

On November 14, 1894, the new company was ordered to be wound up by the Court. Elsner and McArthur were placed on the list of contributories as being liable for 19*s.* per share.

The liquidator took out a summons which, as amended, asked for a declaration that the shares held by Elsner and McArthur, and one Sugden were issued to and held by them respectively, subject to the payment by them to the new company of 19*s.* per share in addition to the sums actually paid.

Herbert Reed, Q.C., and *Job Bradford*, for the liquidator. The onus is on the respondents to shew that before the shares were issued a contract in writing that the shares were not to be paid for in cash was filed in pursuance of s. 25 of the Companies Act, 1867: *In re New Eberhardt Co.* (1)

No contract complying with the section was ever filed. There was no contract with the respondents or with the new company; the old shareholders had only an option to take shares on payment of 1*s.* per share, and the new company was not in existence. The respondents were not shareholders in Spiel's Company, and were not within the consideration given for the patent rights.

(1) 43 Ch. D. 118.

What they did was to acquire extra shares under art. 5. The consideration for the purchase in shares was exhausted by the 2550 shares.

The Court must be satisfied that some substantial equivalent was given for the 19*s.* per share; an illusory consideration is not sufficient: *Chapman's Case.* (1)

Levett, Q.C., and *Butcher*, for Elsner. The agreement of February, 1892, and the deed adopting it were when filed a full compliance with s. 25 of the Companies Act, 1867, and the filing took place before the shares were issued. Any documents forming a contract are sufficient within the section: *Kirby's Case.* (2)

The consideration was not illusory. The old company gave a consideration for the shares—though it was speculative—and was entitled to stipulate that for that consideration shares in the new company should be issued to its own shareholders, whose property it was parting with. Elsner's shares are some of those the numbers of which are stated in the contract; and it is immaterial that the application for them was made on the wrong form.

Elsner was a nominee of an old shareholder, and he is not liable because the formality was dispensed with of issuing the shares to the old shareholder and then transferring them to him. The liquidator seeks to approbate the contract under which the application was made, but to reprobate its terms.

[They also cited *Carling's Case.* (3)]

Cooper Willis, Q.C., and *A. Whitaker*, for McArthur, adopted the argument on behalf of Elsner.

Bradford, in reply. When the shares were issued there was no binding contract. *Kirby's Case* (2), so far as it is inconsistent with *In re New Eberhardt Co.* (4) is overruled thereby. If what was done was ultra vires, it is now too late to rectify it at the expense of the creditors of the company.

Sugden did not appear.

Aug. 5. ROMER J. The first question that arises on this summons, so far as concerns the respondents Elsner and McArthur,

(1) [1895] 1 Ch. 771.
(2) 46 L. T. (N.S.) 682.
(3) 1 Ch. D. 115.
(4) 43 Ch. D. 118.

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is one of fact. Were the shares, the subject of this application, allotted to them as nominees of shareholders in Spiel's Company in pursuance of the option given to those shareholders by the 2nd clause of the agreement of February 15, 1892, confirmed by the deed of March 19, 1892? I am satisfied, on the evidence, that the shares were so allotted, and that they were not issued, as suggested on behalf of the liquidator of this company (the Common Petroleum Engine Company, Limited), under the provisions at the end of clause 2 of the agreement, as shares not applied for by the shareholders in Spiel's Company. The circumstance relied on by the liquidator, that Elsner's application was on a form labelled "extra shares," admits of easy explanation. The facts are, that Spiel's Company (wholly without the authority of this company) issued to their shareholders two forms of application for shares—one as for shares to which they were directly entitled under the agreement, and the other as for extra shares not taken up by some of the shareholders; and the applicants seem not to have noticed any distinction between the two forms, but used them indiscriminately. As a matter of fact, this company, at the time the shares in question were allotted, had not authorized the issue of any shares, and did not in fact allot any shares except to shareholders of Spiel's Company or their nominees in respect of the shares to which they were entitled under the agreement. And I should add that this company never limited a time within which the shares should be applied for, though Spiel's Company did make an abortive and ineffectual attempt to limit a time.

The next question that arises is one of law, whether the agreement and indorsed deed, which have been duly registered, comply with the provisions of s. 25 of the Act of 1867. In my opinion they do, having regard to the cases I am about to refer to. In the first place, the agreement, as confirmed by the indorsed deed, is in itself a contract in writing made before the issue of the shares, and not a mere offer by this company to allot shares like the memorandum which formed the subject of the decision in *In re New Eberhardt Co.* (1) By the agreement this company were bound to allot to each shareholder of Spiel's Company his

(1) 43 Ch. D. 118.

proportion of shares if he applied for them; and the fact that each shareholder had an option and was not bound to apply did not the less render the agreement a contract and one binding on this company. This company had no option in the matter, and, moreover, notwithstanding the curious wording of the agreement, and the form of the assignment made in pursuance of it, dated March 30, 1892, I think the option given formed part of the consideration for the sale of the property, the subject of the agreement. I cannot hold here that the consideration paid for the shares issued was illusory, or that the agreement was a mere fraud or excuse to enable these shares to be issued at a discount or as nearly fully paid up: see *Chapman's Case.* (1) It was suggested by the liquidator that Spiel's Company had no right to distribute a valuable option which was in the nature of capital amongst its shareholders. That may be so; but that is a matter which concerns Spiel's Company and its shareholders and creditors, and which cannot now be relied on by the liquidator for the purposes of this application. There being, then, a contract in writing filed with the Registrar of Joint Stock Companies before the issue of these shares, the next question is whether it is a sufficient contract within the meaning of s. 25. Now, if the question were one arising for the first time, I think a great deal might be said in favour of the contention that a contract within the meaning of the section ought to be (1.) made direct with the allottee, and (2.) shewing on the face of it which are the shares to be allotted or issued to him. But the cases shew that this is not necessary, and that the section (which is in the nature of a penal clause) must not be treated as by implication making essential details with regard to the contract in reference to the above points not mentioned in the section. For example, as to (1.) it has been held that if the contract be to allot shares to A., the shares may be allotted to B. as A.'s nominee, and the contract will then protect B.: see *Carling's Case* (2), and the observations of James L.J. (3) And, apparently, even the company need not be directly a party to the contract. It is sufficient if the contract be with a trustee for

(1) [1895] 1 Ch. 771. (2) 1 Ch. D. 115.
(3) 1 Ch. D. 124.

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the company and adopted by the company: see *Hartley's Case* (1), where Cairns L.C. observes (2): "It is hardly necessary to advert to the argument that the . . . shares ought not to be taken as paid-up shares, because the agreement . . . was not with the company, but with a trustee and before the company was formed. The Act of Parliament does not require the agreement to be with the company, and such agreements are very seldom made with the company directly." And with regard to point (2.), it has been held that the contract need not on the face of it identify the shares: see *Ex parte Forde* (3), and *Hartley's Case.* (1) And see also, on both points, *Kirby's Case* (4), decided by Fry J., and *In re Buenos Ayres and Campana Ry. Co.* (5) In both these last-mentioned cases the registered contract did not specify the shares or the names of the allottees, and yet the allottees were held protected by the registered contract. In the last-named case Sir G. Jessel M.R. pointed out that s. 25 did not render necessary the specification of the shares or of the name of the allottee, and he said that if the contract did not give such particulars the sole effect was to make it more difficult for the holders of shares not paid for in cash to discharge the burden of proving that their shares had, in fact, been issued to them in pursuance of the registered contract. And, with reference to these observations of the late Master of the Rolls, I need not again point out that in the present case the respondents have discharged the burden cast upon them, and satisfied me that their shares were issued in pursuance of the registered agreement.

Having regard to the above authorities, I do not see on what principle the registered agreement is to be held not sufficient. And, indeed, with reference to an agreement which cannot, I think, on principle, be distinguished from that now before me. Cotton L.J., in *In re New Eberhardt Co.* (6), cited above, observed (7): "If the company had registered, not this document but the agreement between the new company and the liquidator, my present opinion is that that would have been a contract

(1) L. R. 10 Ch. 157.
(2) Ibid. 159.
(3) 30 Ch. D. 153.
(4) 46 L. T. (N.S.) 682.
(5) W. N. (1875) 59.
(6) 43 Ch. D. 118.
(7) 43 Ch. D. 126.

registered to issue these shares as fully paid-up shares"; and I gather that Bowen and Fry L.JJ. do not differ in that case from the opinion of Cotton L.J.

Under these circumstances, the application must be dismissed as against these respondents with costs.

The respondent who has not appeared has not ventured to state that his shares were issued to him in pursuance of that registered contract as nominee of one of the shareholders; and that fact does not appear upon the evidence. That being so, and the onus which is on him not having been discharged, as against him the applicant is entitled to succeed.

Solicitor for liquidator: *J. B. Roberts.*
Solicitors for Elsner: *Foss & Ledsam.*
Solicitors for McArthur: *Eagleton & Sons.*

F. E.

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July 24, 25, 26.

In re PRESERVATION SYNDICATE.

[0070 of 1895.]

Company — Rectification of Register — Fully-paid Shares — Neglect to file Written Contract — Winding-up — Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 35—*Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.

Agreement for the sale to the P. Company of fully-paid shares in the C. Company in consideration of the allotment, to the holders of the shares, of fully-paid shares in the P. Company, provided that before the issue of any of the shares to be allotted a sufficient contract in writing should be filed with the Registrar of Joint Stock Companies. By mistake the contract was not filed until after the shares had been issued. On discovering the mistake, one of the allottees gave notice of motion for an order to rectify the register; but before the motion was heard the company was ordered to be wound up:—

Held, that rectification should only be ordered on the terms that due provision should be made for all the debts and liabilities of the P. Company which had accrued between the dates of issuing the shares and giving the notice of motion.

H. H. AYRE was, when the agreement next mentioned was executed, the holder of 948 shares of 1*l.* each in the Co-operative Fish Company, Limited.

By an agreement dated July 27, 1893 (and filed with the Registrar of Joint Stock Companies on the following day), and to which the company, the Preservation Syndicate, Limited, and others were parties, it was agreed—(1.) that each shareholder in the company should sell to the syndicate or its nominees, who should purchase, the several shares in the company set opposite to the name of such shareholder in a schedule; (2.) that as the consideration for the sale the syndicate should allot and issue to each of the shareholders one preference share of 1*l.* in the capital of the syndicate credited as fully paid up in respect of each share of 1*l.* in the company held by such shareholder; (3.) that the sale should be carried into effect as from April 4, 1893; (4.) that the syndicate should undertake and perform and discharge all outstanding contracts and liabilities of the company; and (5.) that before the issue of any of the preference shares a sufficient contract in writing should be filed with the Registrar of Joint Stock Companies.

Ayre transferred his shares in the company to the syndicate, from which he received a certificate, dated June 13, 1893, that he was entitled to 948 fully paid-up shares in the syndicate.

Five or six months after the issue of the certificate Ayre discovered that the agreement under which it was issued had not been filed until July 28, 1893, and thereupon he requested the syndicate to take steps to rectify the register.

On March 5, 1895, Ayre served on the syndicate a notice of motion before Kekewich J. for an order that the register of shareholders might be rectified by striking out the names of the applicant and the other preference shareholders, on the ground that, through mistake or accidental omission, the agreement was not filed under s. 25 of the Companies Act, 1867, previously to the issue or allotment of the shares, and that the syndicate might be directed or authorized forthwith, after the rectification of the register, to register the names of the applicant and the other preference shareholders as members in respect of a corresponding number of preference shares fully paid up, and with the same distinguishing numbers. The notice of motion also asked that, if proper, the applicant might be appointed to represent all the preference shareholders.

On March 8, 1895, the motion stood over till March 14; but on March 13 the syndicate presented a petition asking that it might be wound up by the Court.

On March 14, 1895, the motion stood over till March 29, 1895, on which day Kekewich J. requested Vaughan Williams J. to hear the motion, as the latter had made a winding-up order on March 27, 1895.

Witt, Q.C., and *Edward Ford*, for the applicant. It was the duty of the company to file the contract before issuing the shares as fully paid: *Arnot's Case.* (1) As the company failed in its duty, the liquidator is in no better a position. In one case the Court, after the lapse of fourteen years from the issue of the shares, on being satisfied that the debts of the company were provided for, struck out the names of the shareholders, and directed the issue of new shares after the filing of a proper

(1) 36 Ch. D. 702.

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agreement under s. 25 of the Companies Act, 1867: *In re Darlington Forge Co.* (1) In some cases relief has been given without imposing terms as to payment of the company's debts: *In re Denton Colliery Co.* (2); *In re New Zealand Kapanga Gold Mining Co.* (3)

[VAUGHAN WILLIAMS J. The principle on which the Court grants relief is that there has been a mistake. The parties may agree that there has been a mistake, and to rectify it. If that is not done, an application may be made to the Court. But in either case the rectification must be such as not to interfere with the rights of third parties.]

The only persons prejudiced are the creditors who have dealt with the company on the faith of the shares being paid for in cash—namely, those who dealt with it between the dates of the issue of the shares and the actual filing of the contract. Subsequent creditors who examined the file of the Registrar of Joint Stock Companies would see from the contract that the shares were not to be paid for in cash, and they would not know that the shares had been previously issued, and that the filing was too late to relieve the shareholder from liability to pay in cash. These creditors, therefore, cannot have dealt with the company on the footing that cash was paid for the shares.

[VAUGHAN WILLIAMS J. referred to *In re Harwich Harbour, Docks, Wharves, and Warehouses Co.* (4)]

In that case it was only held that the contract could not be directed to be filed nunc pro tunc. No contract at all had in fact been filed.

It is immaterial that a winding-up order has been made, having regard to the fact that the applicant had already commenced proceedings for rectification: *Reese River Silver Mining Co.* v. *Smith.* (5)

If the applicant is placed on the list of contributories in respect of the shares, he should be allowed to prove for damages in respect of any calls made on him: *Mudford's Claim.* (6)

(1) 34 Ch. D. 522.
(2) L. R. 18 Eq. 16.
(3) Ibid. 17, n.
(4) W. N. (1875) 235.
(5) L. R. 4 H. L. 64.
(6) 14 Ch. D. 634.

Muir Mackenzie, for the liquidator, submitted the case for the Court's decision.

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VAUGHAN WILLIAMS J. This is only another instance of the grave injustice which is from time to time done by a portion of s. 25 of the Companies Act, 1867. The section was enacted to meet a class of cases which it was eminently necessary to deal with effectually. It was extremely common when a company got into difficulties for shareholders who did not wish to be made liable as contributories to come forward and say that they took their shares upon terms that they should not pay cash for them, and all sorts of shadowy excuses were suggested to get off payment, as, for instance, that the shares were allotted as remuneration for supposed services rendered to directors or to the company; and directors or officers of the company were found who were only too willing to come forward and support allegations of this sort. The company to all appearance had all its shares taken up, and persons who dealt with it might well suppose that a cash equivalent for the shares was there; but it turned out that there was no cash equivalent, and that the shares had been issued to those who were interested in the formation of the company, and had nothing to lose if the company came to financial grief, and had everything to gain if it was a success. In such cases one would like to hold that the shareholders must pay up the nominal face value of their contributions to the company; but unfortunately those are not the persons who are caught in the legislative net. The cases which are generally hit by the section are where persons whom the liquidator wishes to place on the list of contributories have made honest agreements to pay for the shares, not in actual cash, but in something else which is really equivalent to a cash payment; and then by the negligence or mistake of some one, perhaps a clerk or solicitor, the contract is not registered, the section takes effect, and the shareholder has to pay over again, and goes away with a sense that the law has done him an injustice. It is not good that that feeling should exist, especially where there is some foundation for it.

This case belongs to a class in which this section most

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frequently works injustice. Here is a company in which the shareholders have paid in full for their shares. A reconstruction becomes necessary, and it is agreed that the shareholders in the old company who have paid up their shares in full shall sell their shares to the new company. The new company has not much cash, so it is proposed that it shall hand over to the old shareholders paid-up shares in the new company of an amount equal to their paid-up shares in the old company. That is what happened here. Hard cash had been paid for the shares in the old company, which were to be exchanged for paid-up shares in the new one, pursuant to an agreement which was to be filed. Through the carelessness of somebody the agreement was not registered. This is the more remarkable because the contract between the old and new companies was in writing, and contained a clause that before the issue of any of the shares a sufficient contract in writing should be filed with the Registrar of Joint Stock Companies. The registration, however, did not take place till July 28, instead of in June, when the shares were issued. The new company got a new solicitor, and he found that the shares had been issued to these people before the contract was filed, and that, inasmuch as s. 25 requires the filing to be "at or before the issue of" the shares, what had been done had not the effect of giving the shareholders fully-paid shares in the new company. The directors proposed to put all right by cancelling the shares which had been issued by mistake before registration, and issuing an equal number of shares at a date subsequent to that of the filing of the agreement; but they were advised that they were no longer in a position to do so because the company was insolvent.

I have to say what is to be done. Here was a mistake. I have not the slightest doubt that the shareholders all honestly supposed that the contract had been duly registered. They had a right to suppose so. The directors of the company thought so too, and they had a right to suppose so. Whether the shareholders or the directors, or both of them, have a remedy against the persons whose carelessness brought about this state of things, I have not now to determine. The mistake is one that the shareholders should have a right to have corrected. The applicant

gave the company notice of a motion to rectify on March 5, 1894, whilst the company was still going on; but before any order was made a petition was presented, and the company went into liquidation. The law is perfectly plain. You cannot correct this mistake to the prejudice of any rights which have arisen in other people in the meantime—that is, rights of persons who have become creditors of the company. Mr. Ford suggested that that rule was not accurately stated by me, and that the mistake might be rectified when you had satisfied all the rights of people who had been induced to deal with and give credit to the company by the state of things which existed. I do not assent to that. You cannot correct this mistake to the prejudice of any rights which accrued in the interval, whether those who have the rights relied on the mistake in the registration or not. I shall make an order that the register be rectified upon due provision being made for all debts and liabilities of the company which accrued between the date of the issue of the shares and March 5, when notice of motion was given. When the list of debts and liabilities has been made out, if it can be agreed on so much the better; if it cannot be agreed, it will come before the registrar, who will settle it himself. There is a decision of Lord Cairns in *Kent* v. *Freehold Land and Brickmaking Co.* (1), that if an application is made after the liquidation has commenced it is too late to rectify. I have given the benefit of the doubt in Mr. Witt's favour by ordering a list to be prepared.

Solicitor for applicant: *F. W. Hill, for F. C. Manley, Hull.*
Solicitor for liquidator: *W. J. Payne.*

(1) L. R. 3 Ch. 493.

F. E.

C. A.
1895
July 17.

VON JOEL *v.* HORNSEY.

[1895 V. 308.]

Light—Interlocutory Mandatory Injunction—Evading Service of Writ.

The defendant was erecting a building near the plaintiffs' house. The plaintiff warned the defendant that if the building were continued he would sue to restrain it as an obstruction of his ancient lights. After action brought the defendant evaded service of the writ for several days, and in the meantime continued the building till substituted service on him was effected :—

Held (affirming the decision of Kekewich J.), that the defendant's evasion of the writ brought the case within the principle of *Daniel* v. *Ferguson* ([1891] 2 Ch. 27), and that the plaintiff was entitled to an interlocutory mandatory injunction ordering the defendant to pull down so much of the building as had been erected after the plaintiff had warned the defendant that he intended to bring an action.

Apepal from an order of Kekewich J.

The action was brought by H. Von Joel, the owner, and A. G. Johnson, the tenant, of a house in Fetter Lane, to restrain the defendant from rebuilding his house on the opposite side of the street to such a height as to obstruct the ancient lights of the plaintiffs' house.

On May 23, 1895, the plaintiffs, through their solicitor, sent a letter to the defendant, objecting to the new building being erected to such a height as to interfere with the plaintiffs' light, and threatening that if he persisted an action would be brought to restrain him.

On May 24 the defendant's clerk called about the letter, but would give no promise to desist from the building, and was told that a writ would be forthwith issued. On the afternoon of the same day the writ in the action was issued, and the plaintiffs endeavoured to serve it on the defendant; but he kept out of the way and evaded the service of the writ until May 28, on which day the plaintiffs obtained an order for substituted service, and the writ was in this way served.

Meanwhile, from the 24th to the 28th, the defendant actively carried on the building; but it did not appear that he put on additional workmen to expedite the work. On the 30th the

gable of the house was built to its full height, and the evidence of the plaintiffs shewed that it materially interfered with their ancient lights.

On May 30 the plaintiffs obtained an interim injunction for a few days; and on July 11 Kekewich J. granted an interlocutory injunction till the trial restraining the defendant from erecting his building so as to obstruct the plaintiffs' lights, and from permitting so much of the new gable as had been built on and after May 24 from remaining as built, the portion to be pulled down being defined by a red line on a photograph. The defendant, with the leave of the judge, appealed from this order.

Buckley, Q.C., and *Ashton Cross*, for the appellant. The appellant did not disobey the order of the Court; and there is no case which goes so far as to order a defendant on an interlocutory motion to pull down a building unless it has been erected in defiance of the order of the Court. In the present case the defendant had no notice that the plaintiffs intended to move for an interlocutory injunction, nor did he hurry on the building by taking on extra workmen so as to take an unfair advantage of the plaintiffs. The case is, therefore, distinguishable from *Daniel* v. *Ferguson*. (1) There is no reason for the intervention of the Court, for the plaintiffs cannot be injured by the continuance of the building till the trial of the action.

Curtis Price (*Hastings, Q.C.*, with him), for the plaintiffs. The case is governed by *Daniel* v. *Ferguson*. (1) It is true that the defendant was not served with the writ and had no actual notice of the plaintiffs' intention to move for an interlocutory injunction; but the reason of that was that he kept out of the way and evaded the process of the Court. He knew that the plaintiffs intended to issue a writ, and his conduct really amounted to contempt of Court.

Buckley Q.C., in reply.

LINDLEY L.J. It seems to me obvious that there is a cause of action in this case. I purposely abstain from expressing any opinion whether at the trial the plaintiffs will be entitled to an

(1) [1891] 2 Ch. 27.

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injunction. But Kekewich J. has granted an interlocutory injunction to restrain the defendant from going on with his building, and a mandatory injunction to pull down a certain portion of his building, namely, that which he has hurried up since May 24, 1895. Now, having regard to the letter written by the plaintiffs' solicitor on May 23, and to the affidavits, the conclusion is irresistible that the building was hurried on as fast as the defendant could hurry it on after May 23 in order that he might say, "I have got it up." The case is within the principle upon which this Court acted in *Daniel* v. *Ferguson* (1), and upon which I will always act. The Court will not allow itself to be imposed upon by a proceeding of that kind. If builders will take the chance of running up a building in that way they must take the risk of pulling it down; and to that extent I think Kekewich J. was perfectly justified in the view that he took; and this appeal must be dismissed, with costs.

LOPES L.J. I am of the same opinion, and I think that Kekewich J. has done that which is right in this case. I desire to say nothing as to what may be the result of this trial—that is a matter for the future; but I have no doubt there has been a material diminution of light, and that is the cause of action. The learned judge has granted an injunction to prevent this building being further proceeded with until the trial, and he has also ordered, by a mandatory injunction, that a certain portion of the building should be pulled down: that portion is only the portion which has been erected since May 23. On May 23 a letter was written to the defendant, and I have not the slightest doubt that he did all he could to evade the service of the writ. The evidence is conclusive, in my opinion; attempts were over and over again made to serve him with that writ, and excuses of all sorts were made with regard to the absence of the defendant. In the meantime instructions are proved to have been given to the foreman, as the foreman states, to hurry on the building, and to do that in defiance of the plaintiffs and of the proceedings before the Court. Under these circumstances the principle in *Daniel* v. *Ferguson* (1) applies to this case.

(1) [1891] 2 Ch. 27.

RIGBY L.J. I am of the same opinion. Three affidavits were filed on the motion for substituted service. The defendant does not say what he might have said if it was true—that he was not aware of these affidavits. He knew very well what the charge was, and he attempts in a very imperfect manner to meet it in his own affidavit. My impression certainly is that he had seen these affidavits, and that he put forward the best answer he could. If he had not received that letter of May 23 he certainly would have told us so. I rather believe he received the letter of May 23; but at all events on May 24 he knew that the Court would be applied to; but he endeavoured to put off the evil day by escaping service, knowing all the time that this building was being carried on rapidly—I do not say with greater rapidity than it had been during the previous weeks—and his object being to get a position of advantage in the action before the Court could interfere. As regards the merits of the case I say nothing; but a primâ facie case has been made out of some injury to the light. That being the case, I think the defendant ought not to have run up his building beyond the red line in the photograph, and that Kekewich J. was right in ordering that he should pull it down.

Solicitors for plaintiffs: *Yarde & Loader.*
Solicitors for defendant: *Taunton & Dade.*

M. W.

C. A.
1895
July 10, 11, 24.

In re FREME'S CONTRACT.

[1895 F. 356.]

Will—Codicil—Annuity—Revocation by Codicil of Gift in Will—Decision as to Future Interests.

A testator by his will gave to his granddaughter A. an annuity of 300*l.*, to be a charge on certain land, and after her death he directed that "the said sum of 300*l.*" should be raised and paid unto and amongst her children as she should by deed or will appoint, and in default of appointment amongst her children equally during their respective lives. He devised to his granddaughter B. a like annuity of 300*l.*, to be a charge on the same property, "and to be paid to her and her children in the same manner in all respects as the annuity hereinbefore given to my granddaughter A." By a codicil reciting that the testator had by his will given an annuity of 300*l.* to each of the two granddaughters he revoked the gifts "of the said annuities," and in lieu thereof gave to each of his said granddaughters A. and B. an annuity of 150*l.*, to be payable and charged in the same manner and on the same hereditaments as the several annuities of 300*l.* were by the will made payable and charged. The children of A. and B. were not referred to in the codicil:—

Held (by Lindley and Lopes L.JJ., affirming the decision of Kekewich J.), that the effect of the codicil was to substitute annuities of 150*l.* to A. and B. and their respective children for the annuities of 300*l.* given by the will, dissentiente Rigby L.J., who was of opinion that the gifts of 300*l.* a year to the children of A. and B. respectively after the deaths of their respective parents were not affected by the codicil.

The Court did not refuse to decide the question on the ground that it affected the future rights of unborn children, the interests of those children being the same as those of the existing children who were before the Court.

THIS case came before the Court on two appeals from a decision of Kekewich J. (1)

W. P. Freme, by will dated February 27, 1877, made (inter alia) the following dispositions: "I give and devise to my granddaughter Anne Helenor, the wife of Samuel Hall, an annuity of 300*l.* a year, to be paid to her half-yearly, for her sole and separate use, and to be a charge on my property in John Street, Liverpool; and after the death of my said granddaughter Anne Helenor, I direct that the said sum of 300*l.* shall be raised and paid unto and amongst all her children as she

(1) Ante, p. 256.

shall by deed or will, and notwithstanding coverture, direct or appoint; and in default of such appointment amongst all the children of my said granddaughter Anne Helenor, in equal shares during their respective lives. I give and devise unto my granddaughter Ellen Elizabeth, the wife of G. Lloyd, a like annuity of 300*l.*, to be a charge upon the said property in John Street aforesaid, and to be paid to her and her children in the same manner in all respects as the annuity hereinbefore given to my granddaughter Anne Helenor." The testator then gave his daughter Mrs. Clement a life annuity of 300*l.*, payable half-yearly, charged on other property; and to his grandson Sidney Clement a life annuity of 150*l.*, payable half-yearly, and charged on other property, "the first half-yearly payment of each of the before-mentioned annuities to be made six months after my decease." After some further gifts the testator gave his residuary estate to his son, James Freme.

The testator made a codicil, dated March 22, 1877, which, so far as material, was as follows: "Whereas I have by my will given and devised to each of my granddaughters, A. H. Hall and E. E. Lloyd, an annuity of 300*l.* per annum, and I have also by my said will given and devised to my grandson Sidney Clement an annuity of 150*l.* per annum, the said three several annuities being payable and charged in the manner and on the hereditaments in my said will particularly mentioned, now I hereby revoke the devises of the said several annuities, and instead thereof I give and devise as follows—namely, to each of my said granddaughters, A. H. Hall and E. E. Lloyd, an annuity of 150*l.* per annum, to be payable and charged in the same manner and on the same hereditaments as the said several annuities of 300*l.* each were in and by my said will respectively made payable and charged; and I give and devise unto my said grandson Sidney Clement an annuity of 100*l.* per annum, to be payable and charged in the same manner and on the same hereditaments as the annuity of 150*l.* per annum was in and by my said will made payable and charged." Then, after some clauses relating to his real estate, the testator concluded, "And in all other respects I confirm my said will."

The testator died in 1878. Some years after his death James

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Freme, on whom the John Street property devolved subject to the annuities, contracted to sell it, and applied, under the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 5, to allow payment into court of a sufficient sum to meet the two annuities charged on it. The question was argued to what annuities the property was subject. Kekewich J. decided that the effect of the codicil was to substitute annuities of 150*l.* payable to the granddaughters respectively and their respective children for the annuities of 300*l.* given by the will.

Mrs. Hall and her children, and Mrs. Lloyd and her children, severally appealed, and in each case the plaintiff gave cross-notice of appeal.

Marten, Q.C., and *Ingle Joyce*, for Mrs. Hall and her children. We contend that the Court cannot decide now as to future interests, and that the possibility of there being further children of Mrs. Hall prevents a decision as to what the position of her children is. But if the Court thinks the point can be decided now, we say that the gift of 300*l.* a year to the children is not varied or revoked. The case is like *Alt* v. *Gregory*. (1) The testator did not in the codicil recite the gift to the children, and so did not shew an intention to revoke it. Where there is a clear gift, it will not be revoked except by language equally clear: *Doe* v. *Hicks* (2); *Randfield* v. *Randfield* (3); *Kellett* v. *Kellett* (4); *Follett* v. *Pettman* (5); *Barclay* v. *Maskelyne* (6); *Wallace* v. *Seymour*. (7) In *Stocks* v. *Hammond* (8) there was a recital of the same kind as here, followed by a revocation of the legacy, and it was held that only the life interest was affected. On the principle of those cases we say that the children take the 300*l.* a year.

Renshaw, Q.C., and *E. S. Ford*, for the appeal of Mrs. Lloyd and her children. The rule against deciding future rights is stated by Jessel M.R. in *Curtis* v. *Sheffield*. (9)

[THE COURT intimated that there could be no substantial

(1) 8 D. M. & G. 221, 236.
(2) 1 Cl. & F. 20, 24, 34.
(3) 4 Drew. 147; 2 De G. & J. 57; 8 H. L. C. 225.
(4) L. R. 3 H. L. 160.
(5) 23 Ch. D. 337, 342.
(6) 5 Jur. (N.S.) 12; Joh. 124.
(7) Ir. Rep. 6 C. L. 219.
(8) 2 N. R. 307.
(9) 21 Ch. D. 1.

objection to deciding the question at once, as the interests of the unborn and the existing children were the same, and counsel gave up the objection.]

There must be a clear revocation to affect a clear gift, and in construing a codicil the dispositions of the will are not to be disturbed more than is necessary: Jarman on Wills, 5th ed. vol. i. p. 139. Take the codicil alone, it is clear the testator revokes what he has given to his granddaughters, not what he has given to their children. The case is very like *Barclay* v. *Maskelyne.* (1)

Warrington, Q.C., and *Arkle*, for the plaintiff. The testator in each case gives an annuity to the granddaughter. The gift to her children is something appended to it, and where he speaks of an annuity given to a granddaughter he refers to the gift with all its modifications. We say, then, that when the testator revokes the gifts of the annuities of 300*l.*, he revokes them altogether, both as to the granddaughters and their children, and he then gives annuities of 150*l.* for life to the granddaughters, giving nothing to their children. We contend, therefore, that the only incumbrances to be provided against are two life annuities of 150*l.* But if the Court does not take this view, that taken by Kekewich J. is the true one, that the annuities are reduced throughout, and not merely as regards the granddaughters. In the will, the testator, in giving the second annuity, describes the former annuity as given to his granddaughter, saying nothing about her children; and so in the codicil the revocation of the annuities applies to the interests of the children as well as of the mothers, a smaller annuity being substituted throughout. The testator treats each annuity as one thing; he does not treat the gifts to the children as separate annuities. In *Barclay* v. *Maskelyne* (1) the decision turned on the words "to wit," which were held to define the class of persons the gifts to whom were revoked.

Cur. adv. vult.

July 24. LINDLEY L.J. The question in each of these two appeals is the same, and turns on the construction of the will and the codicil of Mr. William Purser Freme.

(1) 5 Jur. (N.S.) 12; Joh. 124.

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The testator in this case had a widowed daughter, Mrs. Clement, and three grandchildren, two of whom were married women—the other was the son of the daughter. The testator, after making certain devises which are not material, proceeds thus: [His Lordship read the gift of the annuity to Mrs. Hall and her children, and continued:—] That is the first devise, and my observation upon that devise is that he treats it as a devise of one annuity to Mrs. Hall, and then to her children, as she shall appoint, and, in default of appointment, then for their lives. He does not treat it there as if it were several annuities, one given to Mrs. Hall and another to her children, but he treats it as one annual sum of 300*l.*, and in giving the power of appointment he calls it "the said sum of 300*l.*" Then he goes on: "I give and devise to my granddaughter Ellen Elizabeth, the wife of G. Lloyd, a like annuity of 300*l.*, to be a charge upon the said property in John Street aforesaid, and to be paid to her and her children in the same manner in all respects as the annuity hereinbefore given to my granddaughter Anne Helenor." There, again, in still plainer language, he treats the annuity given to Mrs. Hall and her children as one annuity, and not as two.

Then he goes on (but nothing turns upon this) to give to his daughter an annuity of 300*l.*, to be a charge upon his property in Oil Street, and to be paid to her during her life. He then gives to her son another annuity altogether, which is in these words: "I give and devise an annuity of 150*l.* per annum to Sidney Clement, son of my said daughter Anne T. D. Clement, and his assigns, for his natural life, to be paid half-yearly, such annuity to be charged on such part of my Liverpool property as is not hereinbefore devised to my said son James." Then comes a clause which is applicable to all these annuities, "the first half-yearly payment of each of the before-mentioned annuities to be made six months after my decease." Looking, therefore, at the scope of this will, it appears to me that he devises four annuities, and four only—one to Mrs. Hall and her children, one to Mrs. Lloyd and her children, one to Mrs. Clement, and one to her son Sidney, and directs that as to all these the first payment is to be made six months after his decease. There is nothing more in the will, and it is not suggested that there is any

difficulty in construing it if it stood alone. The question is how far the codicil has revoked the will.

Now we come to the codicil. [His Lordship read the part of the codicil set out above relating to the annuities.] The rest of the codicil is not material until we come to the end of it, where the testator says, "In all other respects I confirm my said will."

The question then arises, To what extent has that codicil revoked the will? It is contended on behalf of the children both of Mrs. Hall and Mrs. Lloyd that the codicil only revokes the life annuities given to Mrs. Hall and Mrs. Lloyd respectively. It is contended on the other side that there is a substitution of a smaller annuity for a larger, and that what is revoked is not the life interest given to Mrs. Lloyd and Mrs. Hall respectively, but the annuities, and that in place of those annuities less annuities are given by the codicil. Kekewich J. has taken the latter view, and in my opinion he is right. I think that if these two documents are studied any other construction will be found excessively embarrassing. The power of appointment which is contained in the will creates a difficulty in the way of the contention of the appellants; but if you substitute the smaller for the larger annuities throughout there is no difficulty at all, and everything works perfectly well. If you do not, you have this curious state of things, that the annuity of 300*l.* a year is revoked by the codicil so far as the lives of Mrs. Hall and Mrs. Lloyd are concerned, but they still, nevertheless, have the power to appoint an annuity of 300*l.* a year, although the language under the will does not admit of their appointing larger annuities than what they themselves receive.

I think, therefore, there is a substitution by the codicil of the smaller annuities for the larger all through. Bearing in mind the rule, impressed upon us very properly by the learned counsel for the appellants, which is laid down in *Doe* v. *Hicks* (1) and *Randfield* v. *Randfield* (2), that you are not to guess at the revocation or to extend it further than the clear language of the revoking instrument requires you to do, it does appear to me, I confess, that we should be missing the real intention of this

(1) 1 Cl. & F. 20. (2) 4 Drew. 147; 2 De G. & J. 57.

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testator if we were to adopt the extreme view contended for by the respondent, that the gift to the children of the granddaughters is altogether revoked, and that they take nothing. On the other hand, I think the appellants are in error in not seeing that the testator in his codicil was dealing with the thing given, not merely with the interests taken in it by the granddaughters. I think, therefore, that the appeals must be dismissed.

LOPES L.J. I am clearly of the same opinion. The rule which we have to regard, I take it, is this, that to cut down a previous gift it must be reasonably clear that it was intended to be cut down. The words cutting it down must not be equivocal, but they must shew with a reasonable certainty that a revocation was intended.

Now, the object in construing all wills is to ascertain the intention of the testator or testatrix so far as it is expressed by the words used; and this passage in the will seems very strong to shew that the view which we take is the correct one: "I give and devise unto my granddaughter Ellen Elizabeth, the wife of Graham Lloyd, a like annuity of 300*l.*, to be a charge upon the said property in John Street aforesaid." Then come these words: "and to be paid to her and her children in the same manner in all respects as the annuity hereinbefore given to my granddaughter Anne Helenor." That makes me think that the testator in the will was dealing with the entire annuity as one thing. Hence it seems reasonably certain that an entire revocation of the devise was intended by the codicil, and a substitution of an annuity of 150*l.* payable to the granddaughter appointees and children instead of an annuity of 300*l.* a year given by the will. Unless that is the correct view it appears to me that it would be difficult to attach the power of appointment given in the will to the codicil.

I come, therefore, to the conclusion that Kekewich J. was right in the interpretation that he put upon this will and codicil.

RIGBY L.J. I have considered the will and the codicil carefully, and I am unable to arrive at the same conclusion as the

Lords Justices have done. The testator by his will dated February 27, 1877, gives in quite plain and unambiguous language to Mrs. Hall, one of his granddaughters, an annuity of 300*l.* a year, to be paid to her half-yearly, for her sole and separate use, and to be a charge upon his property in John Street, Liverpool, and after the death of the said granddaughter he directed that the sum of 300*l.* should be raised and paid for the benefit of her children as in the will mentioned. He then gave to his granddaughter Mrs. Lloyd a like annuity of 300*l.*, to be charged upon the same property, and to be paid to her and her children in the same manner in all respects as the annuity before given to Mrs. Hall. The reference to the gift to Mrs. Hall is inaccurate; but the inaccuracy appears to be a mere slip of the draftsman, and does not raise the slightest difficulty as to what is really given to the granddaughters. The granddaughters take under the will annuities for their respective lives and nothing more, and it is with this broad fact in view that we must approach the codicil.

The codicil is dated March 22, 1877. It is a much better drawn instrument than the will, and there is not a word in it which could raise any suspicion that the express revocation of the annuities to the granddaughters was intended to revoke the annuities to their children. Direct revocation of the latter annuity there is none, and the only way in which a revocation can be brought about is by supposing that the language of the codicil means something different from what would be the result of the plain interpretation of words in themselves clear. The supposition must be that the draftsman used the plain words of reference and revocation in an inaccurate manner because there were inaccuracies in the will, and I do not think (having regard to the recognised canon of construction that a disposition in a codicil must be a plain revocation of a gift in a will in order to take effect as a revocation) that such a conjecture (for it seems to me little more) can be founded upon the language of this codicil. In order to make the codicil a revocation of the gifts to children of grandchildren it has to be altered, for everything in it shews careful drafting. The supposed improbability of the testator meaning to give a larger annuity among the children of

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a grandchild than is given to the grandchild herself weighs little or nothing in my judgment against the plain language of the codicil. We can no more tell the motives operating upon the testator in this case than we can in his treating differently the family of one granddaughter and the family of another. There may have been reasons personal to the grandchildren whose annuities are dealt with by the codicil.

With regard to the power of appointment I find no difficulty. The power of appointment arises under the will, and, according to my view, is not interfered with, and I cannot see the slightest difficulty in supposing that the testator meant to give this power of appointment among the children whatever the annuity might happen to be, whether it was larger or only of the same amount as that which was given to the donee of the power.

Solicitors: *Gibbons & Arkle, Liverpool; Patersons, Snow, Bloxam, & Kinder, for Peele & Peele, Shrewsbury; Rowcliffes, Rawle & Co., for Holland & Rigby, Ashbourne; Garnett & Tarbet, Liverpool.*

H. C. J.

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In re BIRCHAM.

Solicitor—Scale Fee—Company—Debenture Trust Deed—Non-issue of Debentures—"Mortgage"—"Completed Mortgage"—General Order under Solicitors' Remuneration Act, 1881, *r.* 2 (*a*), *Sched. I., Part I.*

A trust or covering deed was executed by a limited company to trustees in the usual form for securing debentures intended to be issued to a certain amount; but the debentures were never issued, and the deed therefore became inoperative:—

Held (reversing the decision of Kekewich J.), that the covering deed so executed was not a completed mortgage within rule 2 (*a*) and Part I. of Sched. I. to the General Order under the Solicitors' Remuneration Act, 1881, and therefore that the solicitor to the trustees was not entitled to charge a scale fee for "preparing and completing mortgage" under that rule.

Whether, if the deed had become operative by the issue of the debentures, it would have been a "mortgage" within the rule, *quære*.

Whether a mortgage for future advances is a completed mortgage within the rule, *quære*.

In December, 1893, the Midland Coal, Coke and Iron Company, Limited, was incorporated for the purpose of taking over

the assets and liabilities of an old company of the same name, in accordance with a scheme of arrangement approved by the Court. By this scheme the new company was authorized to create and issue, as a first floating charge on the whole of its assets, debentures to a total amount not exceeding 90,000*l.*, at 4 per cent. per annum. In order to secure these debentures, a trust deed was executed on January 9, 1894, conveying the freehold and leasehold properties taken over by the company to trustees upon trust for sale, with various other trusts and provisions in the usual form in such deeds for securing the debentures and interest; the company to enjoy the premises and carry on their business thereon until the security became enforceable. The deed provided that the company should pay the principal moneys and interest secured by the debentures in accordance with the tenor thereof respectively, and observe and perform the several conditions endorsed thereon respectively. Clause 37 stipulated that the company should pay to the trustees, as remuneration for their services, until the security became enforceable, the yearly sum of fifty guineas, besides their proper costs, charges, and expenses.

The deed was prepared by the trustees' solicitors, Messrs. Bircham & Co., with whom it was deposited after its execution. It was executed both by the company and the trustees, but it was not stamped, either as a mortgage or otherwise.

Each debenture was in the ordinary form, and contained clauses by which the company consented to pay the sum mentioned in the debenture, with interest at 4½ per cent., and charged with such payments its undertaking and all its property both present and future.

The invitations to the public by prospectus to take up the debentures proved altogether abortive, so that the deed became practically useless. The company borrowed 40,000*l.* from Lloyd's Bank on the understanding that the bank should receive debentures for that amount; but no debentures were in fact issued, and the company made another arrangement for repaying the loan and for raising the rest of the money which it required.

In July, 1894, Messrs. Bircham & Co. delivered to the company a bill of costs for 270*l.* in respect of the trust deed, the bill being

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made out according to the scale charge allowed by Part I. of Schedule I. to the General Order under the Solicitors' Remuneration Act, 1881, to the "mortgagee's solicitor for investigating title to freehold, copyhold, or leasehold property, and preparing and completing mortgage."

On the bill being carried in for taxation, the taxing master refused to allow the scale fee, on the ground that the deed was a deed of trust, and not an ordinary "mortgage": that even if it was a "mortgage," it was not a "completed" one, no money having been advanced: and that therefore Messrs. Bircham & Co. must make out a bill of items, in the ordinary way, for work done. He accordingly made a certificate disallowing the scale charge.

This was a summons by Messrs. Bircham & Co. to review the taxation.

It was stated at the hearing that the reason why the deed had not been stamped was that until the actual amount raised by debentures was ascertained, it was impossible to affix the proper ad valorem stamp, and that, therefore, it was not intended that the deed should be stamped until the debentures had been issued.

The summons came on for hearing before Kekewich J. on June 20, 1895.

Warrington, Q.C., and *Kenyon Parker*, for the applicants. This covering deed is a mortgage, and the applicants, who acted for the proposed trustees, investigated the title, and prepared the deed, are entitled to the scale fee for preparing and completing a mortgage under Schedule I., Part I., of the General Order to the Solicitors' Remuneration Act, 1881. The deed is, in substance, an ordinary contributory mortgage for all the debenture-holders. It contains all the essentials of a mortgage. It is a security for money; it contains a conveyance of freeholds and leaseholds as security, and it imposes a personal obligation on the mortgagors to pay. There is no definition of "mortgage" in the General Order, and if this is not a mortgage it is difficult to say what is. Solicitors who prepare a mortgage have nothing to do with the actual advance of the money, but the business is,

so far as they are concerned, "completed" when the title has been investigated, the mortgage deed prepared and the title deeds handed over to the mortgagee. A mortgage for a future advance would be a completed mortgage within the rule. It is not correct to say in this case that the deed was inoperative, for some of the debentures were agreed to be issued to Lloyd's Bank and were sealed for that purpose. They were, therefore, practically issued.

Bramwell Davis, Q.C., and *Younger*, for the respondents. There are two points to be considered, first whether this deed is a "mortgage" within the meaning of the General Order, and secondly, whether, if so, it has been "completed." Upon the first point, the deed is not a "mortgage" in the ordinary sense; it is not a security for money actually advanced, but only for money which is expected to be advanced, or which possibly may be advanced in the future; and the covenant is to pay, not the trustees, but only the persons who may be mortgagees, that is, the debenture-holders. The debenture-holders, therefore, and not the trustees, are the real mortgagees.

And further, by clause 37 of the deed the company agrees to pay the trustees an annual salary. If the trustees were mortgagees they could not receive a salary for protecting their own security. Neither is the deed stamped as a mortgage: it might appropriately bear an ordinary ten-shilling stamp. This deed cannot be called, in ordinary parlance, a "mortgage": it is not in the nature of a final or definite security, but merely states the terms upon which a security is to be given hereafter. It is nothing more than an inchoate instrument, and the scale is not applicable to such a deed. Enormous sums of money are often named in these deeds and very small sums actually advanced: it is impossible to suppose that the solicitor is to be entitled to the scale fee on a hypothetical amount.

Then, upon the second point, even if the deed be a mortgage, it has not been "completed." To entitle him to the scale fee, the mortgagee's solicitor must not only prepare the deed but get the money: the whole work must be substantially done: *In re Lacey & Son* (1); *In re Smith, Pinsent & Co.* (2);

(1) 25 Ch. D. 301. (2) 44 Ch. D. 303.

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In re Read. (1) Rule 2 (*a*) of the General Order itself indicates that the mortgage must be a completed transaction for the scale to apply. Part I. of Sched. I. fixes the scale fee upon the amount of the "loan," just as upon the amount of the purchase-money in the case of a sale; and rule 11 in Part I. expressly says that the scale fee allowed to a mortgagee's solicitor "shall only apply to cases where he arranges and obtains the loan from a person for whom he acts." It is clear, therefore, that, in order to apply the scale, the mortgage must be completed by the loan: there must be a fund in existence capable of being handed over to the mortgagor. The final completion of the transaction is what is indicated by the General Order: *Savery* v. *Enfield Local Board.* (2) It cannot be said that the mere execution and delivery of the mortgage deed is the "completion" of the mortgage, when the mortgagor receives nothing. It is only by having regard to the actual amount of the mortgage money, or of the purchase-money, as the case may be, that the rule making a fixed charge can be fairly applied: *In re Stewart.* (3) Sect. 4 of the Solicitors' Remuneration Act, 1881, states the principles on which a solicitor's remuneration is to be arrived at. He does not get his remuneration on the ground of difficulty but on account of his responsibility. Here, no loan is made, therefore the solicitor incurs no responsibility, and is under no liability for negligence. If his liability is gone his right to remuneration, on such a scale as is applicable to a mortgage completed in the usual way by a loan, is gone also, though his right to a quantum meruit for his work is not interfered with: *Parker* v. *Blenkhorn*, *Newbould* v. *Bailward.* (4)

Kekewich J. Before venturing to differ from the taxing master I must be satisfied on three points; first, that the instrument before the Court is a mortgage; secondly, that the solicitors objecting to the taxing master's decision are the mortgagees' solicitors; and thirdly, that the mortgage has been completed.

The deed of January 9, 1894 (which I will assume for this

(1) [1894] 3 Ch. 238.
(2) [1893] A. C. 218, 222.
(3) 41 Ch. D. 494.
(4) 14 App. Cas 1.

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purpose to have been, or to have been intended to be, stamped according to law), seems to me to fulfil the essential conditions of a mortgage. A deed which vests property in persons either for their own purposes or for the purposes of others as a security for money lent and for the interest on that money, is a mortgage; and this is a deed of that character. It is a deed in the form of a trust for sale, a form which, if not still common, is not altogether out of date. It contains powers of management of the property, and all such powers as, having regard to the special character of the property, are deemed necessary in order to enable the persons to whom the conveyance is made to enter upon and realise the property conveyed, and, until realisation, to utilise it for the benefit of those to whom the money is due. The persons advancing the money or intending to advance the money are not parties, but that seems to me not of the essence of the transaction. There is no reason, if such a deed were executed with reference to the security of debentures agreed to be taken and intended to be registered, why all the debenture-holders should not be set forth in a schedule, and be made parties to the deed by reference to that schedule. That is not the common form, but I mention it as shewing that it is quite possible to frame the deed in that way.

Now, what is there which makes this deed not a mortgage? There is no covenant of payment to these trustees: of course not. They are not intended to receive any money in that way; or rather they are not intended to recover money from the company, otherwise than through their security. It is not intended that they shall be personal creditors of the company; but the essence of the mortgage surely is not the covenant to pay, and it would be quite possible to have a mortgage without any such covenant. It is not a necessary part of a mortgage at all. Here the omission of the covenant to pay is, as I have already mentioned, because the persons to lend the money as creditors are not persons to whom the mortgage is made. The persons to whom the mortgage is made are agents or trustees for others who hold the debentures as security. It is said that clause 37 is inconsistent with this being a mortgage; but why should not the company pay to the trustees a certain amount of

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remuneration? Whatever is to be paid to these gentlemen for performing their services must fall upon the company who are creating the security, and whether the payment is by salary or in any other way seems immaterial. It is not at all an uncommon thing in mortgages of the strictest form to put in a clause providing for the appointment of a receiver, not by the Court, but by the parties. Who pays for that? Why, the mortgagor. It is quite reasonable and proper that the deed itself, in providing for the appointment of a receiver, should also provide what the receiver is to be paid.

As regards the second point, there really is no room for doubt. If this is a mortgage, there can be no question that the trustees are mortgagees. Nobody else is, and if they are not, it is no mortgage; so that, in holding it to be a mortgage, I necessarily hold, as I intend to hold, that the trustees are mortgagees. Messrs. Bircham acted in this business as the solicitors for the trustees; it follows that they acted for them in their character as mortgagees, and that they were the "mortgagee's solicitors."

Then comes the third point, which, to my mind, constitutes the real difficulty in the case. Was this mortgage "completed"? What is the completion of the mortgage? Mr. Bramwell Davis's argument goes to this—that this mortgage was not completed in the sense that mortgages are generally completed, in the sense in which an ordinary advance of money on freehold or other property is secured by a proper mortgage with proper covenants and provisions; and that, if not completed in that manner, it was not completed at all. I was rather pressed with that view of the case, and I am afraid, if that view is right, it is not a mortgage. But everything that was necessary to bring this to an end, which I suppose means, complete it, was done; and if it was a mortgage it seems to me to follow that it was completed. If it was not completed it seems to me that it was not a mortgage.

What is the essence of completion of a mortgage of the ordinary character? In whatever way the money is found, the deed is not handed over, or rather, I should say, delivered, until the money is forthcoming. It is not a completed deed until the money is handed over. The result is that, whatever

else may be done, the mortgage is not in that sense completed without the loan being also completed. But such a case as that differs from the present in this respect, that this is a conveyance to the trustees who are not themselves to find the money; and it seems to me, that if I am right in saying that a conveyance of property to trustees by way of security for the payment of principal and interest to others is a mortgage, it may be completed without the payment of any money at all. I cannot see why a mortgage of this character is not completed when everything that is contemplated is done. This deed, like all other covering deeds, does not contemplate, as a necessary part of the deed itself, the issue of any debentures. It, of course, contemplates that they will be issued, and the deed would be rendered futile if no debentures are issued, but it does not contemplate the issue as part of the deed itself. I see no reason why on that ground it should not be considered as completed.

I have been asked to say that this case cannot be within the schedule, because it never could have been intended that solicitors should be paid the scale fee when the money is not forthcoming. That does not seem to me to be an argument with which I am concerned on the present occasion. It is well known that neither solicitors nor barristers are always paid the best fees for what is the most troublesome work, and the notion, as I understand it, of the scale fee is that it works an average, so that while in one case it may be an adequate remuneration, in another case it may be an inadequate remuneration. This scale fee is intended to be a fair way of averaging the costs; and, regarding it in that way, I cannot see anything inequitable in holding that solicitors should be paid the scale fee, although, unfortunately for their clients, the amount on which the scale is estimated has not been forthcoming.

My view is that, on January 9, 1894, the day when the mortgage was, as I hold, completed, Messrs. Bircham were then entitled to say, "We have investigated the title to the properties; we have prepared this mortgage deed which has now been executed by the mortgagors and delivered to the trustees, the mortgagees; we have seen that the documents of title are handed over properly and put in the custody of the mortgagees;

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and, that being so, we say we have completed the mortgage." On those grounds I think the matter must go back to the taxing master with a direction to allow the scale fee—he must say what the scale fee is—and the company must pay the costs of this application.

G. I. F. C.

C. A.

The company appealed from this decision, and the appeal was heard on July 24, 1895.

Bramwell Davis, Q.C., and *Younger*, for the appellants, referred to the same cases as they cited in the Court below.

Warrington, Q.C., and *Kenyon Parker*, for Messrs. Bircham & Co.

Lindley L.J. In this case a question of some little difficulty has arisen; but having had the advantage of the argument on both sides, we have come to the conclusion that the view taken by the taxing master is correct. Of course there is no question here at all about paying these gentlemen, Messrs. Bircham, for their services. Nobody disputes that; but it is a question whether they are to be paid in one particular way rather than in another way.

Now, their contention is this: that there was a security (I call it by that name for the present) for 90,000*l.*, and they say, "We prepared that, and we are entitled to the scale fee upon that sum." That is their case. The other side say, "It is true that you had to prepare a security for 90,000*l.*, but not a farthing has been raised on it; therefore you are not entitled to the scale fee, but are entitled to be paid in the ordinary way as solicitors, apart from the scale, for your work and labour as taxed by the taxing master." I will not go into the facts at present. I will begin by looking at the Act of Parliament under which the question arises, that is, the Solicitors' Remuneration Act, 1881. That Act of Parliament says that orders may be made for prescribing and regulating the remuneration of solicitors in respect of business connected with sales, purchases, leases, mortgages, and so on, "and in respect of other business not being business in any action," and so on. Then the order which has been made in

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pursuance of that Act of Parliament contains a clause—clause 2, which is the important one. Clause 2 says: "Subject to the exception aforesaid"—which we need not refer to—"the remuneration of a solicitor in respect of business connected with sales, purchases, leases, mortgages &c. is to be regulated as follows." Then come three sub-clauses: "(*a*) In respect of sales, purchases, and mortgages completed" the remuneration shall be according to scale. I pass over leases and agreements for leases, which do not apply to this case. Then sub-clause (*c*) is contrasted with (*a*): "In respect of business not hereinbefore provided for connected with any transaction"—I read it short—"which is not in fact completed, and in respect of settlements, &c., not provided for hereinbefore or in Schedule I. hereto . . . . and in respect of all other deeds or documents, and of all other business the remuneration for which is not hereinbefore, or in Schedule I. hereto prescribed, the remuneration is to be regulated according to the present system as altered by Schedule II. hereto." So what we have to do is to determine in which class this transaction falls. Is it within class (*a*), a mortgage completed, or is it within class (*c*), a transaction not in fact completed? Well, I have no hesitation in saying now that we know the facts that it is under class (*c*), and not under (*a*) at all.

Now, the short facts are these. Here is a company which has been formed, and which proposes to raise debentures to create first a prior charge of 90,000*l.* debentures, and the security in question is prepared by solicitors for that purpose. The security consists of a trust deed to secure these first mortgage debentures, and of the debentures themselves, the debentures being an essential part of the security. The debentures contain a covenant to pay, and the company charges with such payments its undertaking and all its property, and on the back of them are certain conditions which say that the holders of the debentures are or will be entitled pari passu to the benefits of the conditions contained in the deed—that is, the deed in question. That is their security. The deed is what it purports to be: it is a conveyance to trustees upon trust to secure these debentures; but until a debenture is issued the trust upon which the property is held is a trust for the company. It is in vain to call this

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a mortgage before there are debentures issued. It does not come into operation at all except as regards the possession of the legal estate. No doubt the legal estate is transferred to the trustees as the deed has been executed by the company; but there is no security until the debentures have been issued, and the issue of debentures is an absolute condition precedent to this becoming a security. I do not mean to say a deed in this shape might not be called a mortgage; but when you bear in mind that it is not a mortgage in form, and is not a mortgage in the ordinary sense, but is only what it purports to be, a better security for a charge already created, and when you bear in mind it has no effect whatever until a debenture is issued, it seems to me vain to contend that this security or mortgage, whichever you call it, is a completed piece of business or a completed transaction of any sort or kind. It seems to me that that is the true answer. I doubt very much whether Mr. Parker is right when he says a mortgage to secure future advances would be brought within the scale. Suppose nothing is due? I doubt very much whether the scale would apply, and I doubt very much whether he is right in saying that a solicitor would be entitled to the scale fee upon the largest sum that might be covered by the stamp. As I say, I doubt it; but we have not to decide that, and therefore I say no more about it. It seems to me that until the debenture is issued there is no completed transaction. Then what takes place is this. The whole thing was void. Before they issued any debentures, and I suppose when they hoped to issue them, the directors went to Lloyd's Bank and borrowed various sums of money amounting to 40,000*l.*, and there was an agreement entered into with Lloyd's Bank that Lloyd's Bank should have debentures if they wanted them, and debentures I believe were sealed; but these debentures were never issued and the whole scheme was changed, and they borrowed 90,000*l.* from an insurance office on an ordinary mortgage, and paid off the money that had been advanced by Lloyd's Bank. If you call it a mortgage, which I do not think it is, but call it what you will, it seems to me clearly to come within class (*c*) as an uncompleted, or not in fact completed, piece of business, rather than to come under class (*a*), which relates only to mortgages completed.

That was the view of the taxing master. I think he was quite right; and I think, therefore, that this appeal must be allowed.

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LOPES L.J. I am of the same opinion. The question which arises on this appeal is whether a solicitor is to be paid by scale or whether he is to be paid according to the items he brings forward in his bill of costs. He claims to be paid on the scale, and to be paid for a document which he says is a mortgage for 90,000*l*. The only question in point of fact that it is necessary to deal with here is, whether this instrument can be regarded as a completed transaction. It seems to me it is impossible that it can be said to be a completed transaction. It is to be observed that the Act of Parliament, and the General Orders made under it, never spoke of a "mortgage deed"; the word used is "mortgage," by which I understand a mortgage transaction. Now, can this be said to be a completed mortgage transaction? Can it be said that when a solicitor has done all that he has to do with regard to the preparation and execution of the deed, that it is a completed mortgage, although not a penny is ever advanced, and the real object of the transaction, namely, the obtaining of the advance, is never attained? Can that matter possibly be said to be a completed transaction or a completed mortgage? In my opinion it cannot. In the case now before us no debentures were issued. It is said, I know, that there were some issued to Lloyd's Bank; but I do not think that what took place amounted to an issue of debentures. I think it was rather this, that Lloyd's Bank said, "We are willing to take these debentures, but we only propose to hold them to this extent, namely, to prevent your giving them to somebody else." To my mind that cannot be said to be an issue of these debentures. Speaking for myself, although we are not called upon to decide that point, I do not think this deed is a mortgage within the Act. The security for the advance, to my mind, is the debenture. This deed, when followed by a debenture, in my opinion constitutes a mortgage; therefore I am satisfied to rest my judgment upon the first point, namely, that this clearly is not a completed transaction. I am of opinion, therefore, that the taxing master was right, and that this appeal ought to be allowed.

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RIGBY L.J. I am of the same opinion. Whatever else this deed may be, I think it is not a completed mortgage within the meaning of the Act. At the date of the execution it is not a security at all. It is a deed which is prepared with a view to its becoming a security of some kind if certain preliminary conditions are complied with—if there are people to whom debentures are issued who would be secured by the deed. But at the moment of execution it is a mere conveyance to trustees for the company, and it may never happen, and, in my opinion, it never did happen, that a single debenture was issued, so that it never became a security for any debenture. I say that, notwithstanding what has been pressed upon us by Mr. Kenyon Parker (I mean the transaction with Lloyd's Bank), I have no doubt that Lloyd's Bank had a perfect right to call for the debentures; but it was not their object that they or their trustees should be actually debenture-holders unless a case of necessity arose. They wanted to have an opportunity of getting debentures, and that unquestionably they were entitled to; but on the evidence it appears they never went so far that they had actually debentures, and I do not believe this deed ever became a security for anything. Whether it could be a mortgage, even if the debentures had been previously issued (I mean a mortgage within the meaning of the statute), or not, may be open to more doubt, though, so far as I am personally concerned, I think that the completed mortgage must be a mortgage completed in a business sense at the time. I say advisedly a business sense. I do not mean to say that if the mortgagees did not pay their money in twenty-four hours, or anything of that sort; but if the meaning was that they were to pay at once, and if they did pay practically in accordance with the agreement, that would be one thing; but when it comes to an arrangement which may extend over years, and which never may be carried out at all, I do not think that it could be possible by anything that followed afterwards to turn that into a complete mortgage which was not intended to be a complete mortgage at the time when it was drawn.

I doubt very much whether you could possibly bring within this a case of a mortgage for future advances. The agreement really is that the advances may or may not be secured, and may

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be postponed. I do not mean, for instance, an advance to-morrow, or anything of that kind. I look to the substance of the transaction, and if it is possible to say, "This may go on for an indefinite time without being a security for any money at all," I do not think you can treat it as a completed mortgage. It follows, of course, that the taxing master's view was right; and it would be equally so, according to my view, whether the claim was presented for payment on the scale appropriate to the 90,000*l.*, or the 40,000*l.* which we are told that Lloyd's Bank did actually advance. The whole scheme was given up before the mortgage became a security for anything, and there was no moment of time at which it could be said that it was a completed security.

Appeal allowed.

Solicitors: *Bircham & Co.; Thorowgood, Tabor & Hardcastle, for Cooper & Co., Newcastle-under-Lyme.*

M. W.

In re FARNHAM (A LUNATIC).

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Lunacy—Bankruptcy—Committee—Trustee—Adjudicating Lunatic Bankrupt—Jurisdiction—Title of Trustee—Lunatic's Property, Application of—Creditors, Rights of—Discretion—Voluntary Settlement—Void Gift—Beneficiary, Right of—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 47—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 1—*Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *ss.* 117, 120.

A lunatic can be adjudicated a bankrupt under the direction of his committee acting with the consent of the Court in Lunacy, but whether he can be so adjudicated independently of the Court in Lunacy, *quære.*

Upon a person being found lunatic, the jurisdiction of the Court in Lunacy immediately attaches to his property, including the discretionary powers vested in the Court by ss. 117 and 120 of the Lunacy Act, 1890, of applying his property for his benefit, and cannot be ousted by a subsequent adjudication in bankruptcy made without the consent of the Court, even assuming such adjudication to be valid (as to which, *quære*); and therefore the trustee taking the lunatic's property under such an adjudication can only do so subject to the jurisdiction in lunacy.

A voluntary settlement which is "void against the trustee" in bankruptcy of the settlor under s. 47 of the Bankruptcy Act, 1883, is void for all purposes, and does not entitle the trustee to stand in the place of the beneficiary so as to defeat a prior title to the settled property, such as the

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paramount jurisdiction of the Court in Lunacy where the settlor has, between the dates of the settlement and the adjudication in bankruptcy, been found lunatic.

Sanguinetti v. *Stuckey's Banking Co.* ([1895], 1 Ch. 176) approved.

ON August 5, 1893, William E. J. B. Farnham was found lunatic by inquisition, and on the same day his wife was appointed committee of his person and estate, liberty being given to her to expend a certain sum for the maintenance of the lunatic, his wife and children. On March 17, 1894, a receiving order in bankruptcy was made against him by the county court at Northampton upon a creditor's petition, the act of bankruptcy being the seizure of some of his goods in execution under a judgment in an action on November 13, 1893, the retainer of the goods by the sheriff for upwards of twenty-one days, and a subsequent sale of the goods in February, 1894. The first meeting of creditors was held on May 7, 1894, when a trustee was appointed. On May 19, 1894, the lunatic was adjudicated a bankrupt on the creditor's petition, and on the 26th the trustee's appointment was confirmed by the Board of Trade. In the course of his inquiries as to the bankrupt's estate the trustee ascertained that in December, 1892, several chests of silver plate belonging to the lunatic were in the possession of a bank on behalf of Mrs. Farnham, an inventory of the plate having been deposited with the bank by her describing the property as hers. On October 28, 1893, these chests of plate were removed by Mrs. Farnham to her own private bankers, and she claimed the plate as her property, on the ground that the same had been given to her by her husband verbally in December, 1892, and by a written memorandum of gift signed by him on January 3, 1893. On ascertaining these facts the trustee applied to the county court in bankruptcy for an order for the examination of Mrs. Farnham as to her dealings with the bankrupt's property. At her examination, which took place on August 13, 1894, she claimed the plate as an absolute gift to her from her husband made in December, 1892, and stated that in that month, immediately on the gift being made, she substituted her name for that of her husband upon the chests. She relied upon the memorandum of January 3, 1893, as a confirmation of the gift, no suggestion being

made by her on her examination that she held the plate as his committee. Subsequently, on February 9, 1895, the trustee served Mrs. Farnham with a notice of motion for March 28, 1895, before the county court for an order declaring that the articles of plate at her bankers were his property as trustee, and that on the hearing of the motion he should contend that the alleged gift was a "settlement" on the wife of the bankrupt within s. 4 of the Bankruptcy Act, 1883, and was void against him as trustee through having been made within two years of the bankruptcy. (1) Thereupon, on March 19, 1895, Mrs. Farnham as committee applied to the Master in Lunacy for, and obtained, an order that the plate at her bankers should be deposited in court, and that she should be at liberty to appear upon and oppose the trustee's motion. The plate was accordingly deposited in court in the lunacy. The trustee's motion came on for hearing before the county court judge on March, 28, 1895, the trustee and Mrs. Farnham being each represented by counsel. At the hearing Mrs. Farnham, having been advised that she could not maintain her claim to any beneficial interest in the plate, withdrew it, but asserted her title to retain the plate as committee. An order was then made by the county court judge declaring that the plate was the property of the trustee in bankruptcy, "subject nevertheless to the jurisdiction of the judge in Lunacy thereon," and Mrs. Farnham was ordered to pay the costs of the application so far as they had been occasioned by her claim to a beneficial interest in the plate out of her separate estate.

On July 8, 1895, the trustee took out a summons in lunacy, asking that the plate in court might be delivered out to him.

Besides the plate, which was said to be of considerable value,

(1) Sect. 47 enacts, by sub-s. 1, that "any settlement of property not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in bankruptcy . . ." and, by sub-s. 3, that "'settlement' shall for the purposes of this section include any conveyance or transfer of property."

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the fund in court to the credit of the lunatic and available for his maintenance consisted of only 928*l.* India 3½ per cent. Stock and 9*l.* cash. It was stated that he was tenant for life of certain settled estates, but that his life estate was already mortgaged to its full value, so that no income was available from that source.

Swinfen Eady, Q.C., and *R. J. Parker*, for the trustee in bankruptcy. The gift of the plate by the bankrupt to his wife in December, 1892, or January, 1893, was void under s. 47 of the Bankruptcy Act, 1883, as having been made within two years of the bankruptcy, and the title of the trustee was declared by an order made in the wife's presence. So far the trustee's title is clear. But the question arises whether Mr. Farnham, being a lunatic, could be adjudicated a bankrupt at all. The adjudication was by virtue of s. 1 of the Bankruptcy Act, 1890, which enacts, generally, that "A debtor commits an act of bankruptcy if execution against him has been levied by seizure of his goods under process in an action in any court, or in any civil proceeding in the High Court, and the goods have been either sold or held by the sheriff for twenty-one days." There is clear authority that a lunatic can be adjudicated bankrupt adversely to himself, and that the mere fact of a man becoming lunatic does not prevent his property being taken for the benefit of his creditors: *Anon.* (1), where Lord Eldon said that lunacy was no defence against a commission of bankruptcy.

[LINDLEY L.J. *Ex parte Stamp* (2) seems to be an authority the other way.]

There is a distinction between a bankruptcy adverse to the lunatic, as is the case here, and a bankruptcy which is a voluntary act on the part of the lunatic. In the latter case the adjudication can only be made through the committee with the leave of the Court in Lunacy: *In re James* (3); *In re Lee* (4); *In re Cahen.* (5) There is no exception, either in the Bankruptcy Act, 1883, or in the Bankruptcy Act, 1890, to the effect that a lunatic cannot be made a bankrupt, and we rely on the absence

(1) 13 Ves. 590.
(2) De G. 345.
(3) 12 Q. B. D. 332.
(4) 23 Ch. D. 216.
(5) 10 Ch. D. 183.

of any such exception: *Horne* v. *Pountain* (1); *In re Plenderleith.* (2) Accordingly, we submit that the bankruptcy is regular, and that the trustee's title is made out.

Again, the Court has a discretionary jurisdiction in the matter; and the question is whether the Court should, in the exercise of that jurisdiction, order the lunatic's property which is under its control to be applied for the benefit of his creditors or for his maintenance. Assuming the property is the lunatic's, it is vested in the trustee, who has a statutory duty to apply it for the benefit of the creditors, though it cannot be made available for that purpose without application to this Court. The Court does not take from the trustee property that is intended for creditors and apply it for the maintenance of the lunatic. Where bankruptcy has occurred before the lunacy, the lunatic's property has been handed over by the Court in Lunacy to the trustee: *In re Hinds* (3), and there seems no reason why the same course should not be adopted where the lunacy has occurred before the bankruptcy. Cases such as *In re Plenderleith* (2), where it has been held that a charging order is not sufficient to oust the jurisdiction in lunacy, do not apply to the present case, for here the trustee claims by virtue of a statutory title which is paramount to the exercise of the jurisdiction of the Court in Lunacy.

But, further, the trustee is entitled to say this: the plate was not the bankrupt's property at all: it was a gift by him to his wife; and although the gift was void as against the trustee in bankruptcy under s. 47 of the Act of 1883, yet it was not void as against the wife, so that it remains the wife's property, and the trustee holds it for the wife, and therefore it has been improperly brought into court in the lunacy.

Warmington Q.C., and *Buckmaster*, for Mrs. Farnham, the committee. The first question is, What is the consequence of a man becoming a lunatic? Under s. 120 of the Lunacy Act, 1890, his committee then has a general power of disposition over his whole property, both real and personal, but exercisable under the order of the judge in Lunacy. Thus the general title

(1) 23 Q. B. D. 264, 269. (2) [1893] 3 Ch. 332, 336.
(3) 7 Ch. D. 26.

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of the trustee in bankruptcy of a person who has become lunatic previously to the bankruptcy is subject to the jurisdiction already vested, by virtue of the lunacy, in the judge in Lunacy; and, under s. 117, the judge may exercise that jurisdiction by ordering money to be raised out of the lunatic's property for, among other purposes, "Payment of or provision for the expenses of his future maintenance." Those two sections accordingly mean—applying them to the present case—that on August 5, 1893, the date of the lunacy, the judge in Lunacy had jurisdiction to deal with the whole of the lunatic's property in such manner as he thought fit under s. 117, and any one subsequently taking the lunatic's property took subject to that jurisdiction. Thus the statutory power of the judge in Lunacy exists in priority to the title of the trustee in bankruptcy. If bankruptcy occurs before the lunacy, then, no doubt, the title of the trustee is paramount, the property being already vested in him by virtue of the bankruptcy: *In re Hinds* (1); but there is no authority that a man whose title has accrued subsequently to the lunacy may take possession of the lunatic's property without the consent of the Court in Lunacy. On the contrary, all the reported authorities are the other way: *In re Winkle* (2); *In re Leavesley*. (3)

Again, the title of the trustee cannot prevail as against the committee in whose hands the lunatic's property was. There is no authority that, where the property of a bankrupt lunatic is in the possession of the committee, the trustee in bankruptcy can recover it from the committee or assert his right as trustee against the Court in Lunacy. We submit that if the property of the lunatic has been in the possession of the committee, as it has been here throughout, then the jurisdiction of this Court attaches, irrespective of the date of the bankruptcy. The interests of the lunatic have to be considered before any other claim, and, as the property in court is the only property available for his maintenance, we ask that the whole of it may be applied for his benefit.

Then, with regard to the point that the gift of the plate by the husband to the wife was not void as against her, the trustee

(1) 7 Ch. D. 26. (2) [1894] 2 Ch. 519.
(3) [1891] 2 Ch. 1, 11, 12.

cannot set up in his favour against some one else a gift which he has himself, through the action of the Bankruptcy Court, and through the consent of the wife herself, set aside: the result of the order of the Court of Bankruptcy was to sweep away the gift altogether for all purposes: *Sanguinetti* v. *Stuckey's Banking Co.* (1) Thus far our argument has proceeded on the assumption that this adjudication in bankruptcy was valid; but we submit that in point of law it was altogether irregular and invalid. There is no authority that a lunatic can be made a bankrupt, for he cannot commit an act of bankruptcy. Sect. 1 of the Bankruptcy Act, 1890, cannot apply to a married woman or an infant, and it is impossible to draw any distinction between the disability of a lunatic and the disability of a married woman or an infant.

[RIGBY L.J. What is the object in that section of the requirement that the goods must have been held by the sheriff for twenty-one days?]

To enable the debtor to pay; but a lunatic cannot pay, nor can an infant or a married woman. Williams on Bankruptcy (6th ed. p. 4) treats it as an open question whether a lunatic can be made a bankrupt.

[LOPES L.J. Robson on Bankruptcy (7th ed. p. 119, 120) apparently takes a different view, and cites *Ex parte Layton.* (2)]

What is said in *Ex parte Layton* (2) is only a dictum.

The case of a lunatic is analogous to that of an infant, as in *In re Beauchamp Brothers* (3), where it was held that an infant partner could not be made a bankrupt. *In re Lee* (4), so far as it goes, supports the view that a lunatic cannot be made a bankrupt, without, at all events, the consent of the Court in Lunacy.

R. J. Parker, in reply. First, as to the validity of a lunatic's adjudication in bankruptcy.

[LINDLEY L.J. In Williams on Bankruptcy it is said that that question has been an open one since the time of Lord Eldon: suppose we leave it open a little longer.]

Then, supposing the bankruptcy is good, the lunatic's property passes to the trustee in bankruptcy, whose title supersedes any

(1) [1895] 1 Ch. 176, 180.
(2) 6 Ves. 440.
(3) [1894] 1 Q. B. 1, 6, 8.
(4) 23 Ch. D. 216.

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title of the Court in Lunacy to apply the property for the maintenance of the lunatic.

In *In re James* (1) and *In re Lee* (2) it is assumed that a lunatic's property may be divided among his creditors notwithstanding the lunacy. But if we are wrong on that point, then our second point is that the Court in Lunacy had no control over the property until subsequently to the title of the trustee; for, when the trustee's title accrued, the property was not in the jurisdiction in lunacy at all, but was, rightly or wrongly, in the possession of Mrs. Farnham. The appointment of a committee does not stop an execution being levied against the lunatic's property unless a receiver has been appointed, or the property has been brought into court.

LINDLEY L.J. This is an application by the trustee in bankruptcy of a lunatic, Mr. Farnham, that certain articles of silver plate now deposited in court in this matter may be delivered out to him.

The summons raises a question of some little difficulty. Before I come to the legal aspect of the case I will state shortly those facts which give rise to the controversy. [His Lordship stated the facts, and continued:—]

Now, the legal questions which arise are these: First of all, there is the broad question—and it is an important one—whether a person who has been found lunatic by inquisition can be adjudicated a bankrupt at all. That question is by no means so free from difficulty as at first sight appears. There is no doubt whatever that the 1st section of the Bankruptcy Act, 1890, applies in terms to all debtors; and, as has been pointed out in argument, all debtors include not only lunatics but infants; but there may be a difficulty in holding that an infant could be adjudicated a bankrupt under that section, and a difficulty in holding that a lunatic can be so adjudicated.

It appears that this doubt about the validity of adjudications in bankruptcy against lunatics is a very old one, and has not yet been altogether removed; and I do not propose on the present occasion to solve that doubt. If it were necessary to do so, I

(1) 12 Q. B. D. 332. (2) 23 Ch. D. 216.

should like to look a little more closely than I have done into the course that legislation has taken about lunatics and into the authorities; but I shall assume for the purpose of this decision that Mr. Farnham has been validly adjudicated a bankrupt, and that his trustee has been validly appointed.

Now, assuming that, Mr. Swinfen Eady says that everything follows in his favour, and that the Court ought to direct this plate to be handed over to his trustee; but it has been pointed out, and I think very properly, that inasmuch as this lunatic was adjudicated a bankrupt some time after he was found a lunatic by inquisition, the trustee in bankruptcy must take subject to the powers of the judge in Lunacy conferred by the Lunacy Act, 1890; and the Lunacy Act, 1890, by ss. 117 and 120, vests in or confers upon the judge in Lunacy various powers, including a power to apply the estate of the lunatic in discharge of his debts; and although I believe it is perfectly well settled that a lunatic can be adjudicated a bankrupt under the direction of the committee acting under the order of the judge in Lunacy, there is a question whether he can be validly so adjudicated apart from that.

Now, supposing that the trustee takes subject to the statutory powers of the judge in Lunacy, the main point in Mr. Eady's argument is answered, and I think Mr. Warmington was quite right in saying that, whatever may be true of the actual vesting of the property in the trustee, it does not follow that the trustee may take the property which is so vested in him except subject to the jurisdiction which has accrued before the bankruptcy to the judge in Lunacy under the inquisition. I think that is a good answer to Mr. Eady's argument so far as that point goes.

Then Mr. Eady took this ground: he said, "But this property is not the bankrupt's property at all; you, the judge in Lunacy, have nothing to do with it; it was the property of his wife," and he put his argument in a very ingenious way. He said, "If you look at s. 47 of the Bankruptcy Act, 1883, it says that any settlement of property is void if it is made within two years of the bankruptcy." It was admitted on all hands, looking to the last words of that section, that any gift of property is void as against a trustee in bankruptcy. He then says, "It was not

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void as between husband and wife; and, therefore, although I am entitled to this property under s. 47, I am entitled to say that it is not the husband's property but the wife's; and if it is the wife's it never ought to have been handed over to the judge in Lunacy, and it vests in me by a title which does not concern the judge in Lunacy." That is ingenious; but, when you come to look at the section and consider the meaning of it, I think that argument is unsound; and in fact it has been dealt with judicially, and condemned judicially, by Chitty J. in the case of *Sanguinetti* v. *Stuckey's Banking Co.* (1). If the settlement is void as against the trustee, it is void altogether. The section does not mean that the property, the subject of the settlement, vests in the trustee by a title which overrides both that of the donor and the donee. The settlement being void, the property reverts to the donor, and it is as the donor's property that it vests in the trustee and must be distributed correctly. That was the view taken by Chitty J. of this section, and I think that it is right. Therefore, the trustee can only take it if it is the property of the donor, that is, of the lunatic. Then, if it is the property of the lunatic, it is subject to the order, disposition and jurisdiction of the judge in Lunacy which had accrued before the adjudication.

Then, if that is so, we have to consider what is the proper mode of exercising that discretion which the Court has with regard to allowing the property of the lunatic to go to his creditors. First, will the Court always do that? The duty of the Court is to look after the lunatic and his interests, and we are told that the state of affairs here is such that it will be contrary to the lunatic's benefit and interest if we allow this property to be distributed among his creditors. We are bound to protect him, and, having seen our way to give a sufficient answer, and a proper answer, to all the arguments of the trustee, the conclusion we have arrived at is that this summons ought to be dismissed, and dismissed with costs.

LOPES L.J. I am of the same opinion. The case may be shortly dealt with when it is thoroughly understood.

One question arises which, no doubt, is a very important one,

(1) [1895] 1 Ch. 176.

that is, whether a lunatic can be adjudicated a bankrupt. At the present moment that is rather in the nature of an open question. There is certainly no direct decision in regard to it. It is a very important matter, and a matter with regard to which I should like to give a great deal more time than I have given to it before expressing any opinion upon it. I propose, therefore, to leave that an open question, as it has been hitherto; but I will, for the purposes of this case, assume that a lunatic can be adjudicated a bankrupt.

Then arises this point with regard to how far this plate has vested in the trustee in bankruptcy for the benefit of the creditors, or whether it is not subject to the disposition of the judge in Lunacy.

Now, the first and most important question of all to consider is with regard to certain dates. This man Farnham was found a lunatic on August 5, 1893; in November, 1893, judgment and execution was obtained against him. On May 19, 1894, he was adjudicated a bankrupt, his adjudication being under s. 1 of the Bankruptcy Act, 1890, which says: "A debtor commits an act of bankruptcy if execution against him has been levied by seizure of his goods under process in an action in any court, or in any civil proceeding in the High Court, and the goods have been either sold or held by the sheriff for twenty-one days." That happened; and therefore I take it that there was, upon the words of the section, a valid adjudication in bankruptcy. But then it must be recollected that this adjudication in bankruptcy was after the date on which Farnham was found to be a lunatic; and then the consideration arises whether or not the jurisdiction of the Court in Lunacy does not take effect. There is no doubt of this, I apprehend, that, subject to what I am about to say, the property of the bankrupt would have vested in the trustee; but the trustee, in my judgment, took his title subject to the power contained in s. 117 of the Lunacy Act, 1890. The title of the trustee was acquired subsequently to the lunacy, and, being acquired subsequently to the lunacy, in my opinion it cannot be enforced in lunacy, in consequence of the 117th section of the Lunacy Act, 1890; and that being so, this plate is subject to be dealt with by the Court according to its discretion.

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In favour of the trustee another point was taken under s. 47 of the Bankruptcy Act, 1883. It was said that this property was the property of the wife, and that the gift, as it had been made within two years of the adjudication in bankruptcy, was void as against the trustee. But if the gift was void, the property became vested in the donor, and the donor was a lunatic. This point is completely answered by *Sanguinetti* v. *Stuckey's Banking Co.* (1) What is said is this: the trustee is attempting to set up a settlement that he himself has set aside, which he cannot do, and therefore this property never vested in the trustee in the same way as the other property did, and is, under s. 117 of the Lunacy Act, 1890, subject to be disposed of by the judge in Lunacy. With that I agree.

Then, if that is so, how is this property to be dealt with? There is abundance of authority—in point of fact it is essential, I may say—that the matter that should first be considered in dealing with the property of the lunatic is, What is for his advantage? It appears here that there are very small funds that can be applied to his maintenance, and that without the fund in court in all probability he will become a pauper. Under those circumstances I am of opinion that it is the duty of this Court to have this fund so disposed of as that it shall be applied towards the maintenance of the lunatic. I think that the argument of Mr. Warmington was right, and therefore that this application should be dismissed.

RIGBY L.J. I am of the same opinion. I am not myself satisfied that there can be an adjudication in bankruptcy against a lunatic otherwise than through the judge in Lunacy directing the committee in the name of the lunatic to commit an act of bankruptcy. Without that direction there are reasons which shew that it is difficult to see how an adjudication in bankruptcy can operate as against a lunatic, however it is brought about. How can a lunatic commit an act of bankruptcy? That is one question that has to be answered. Again, how can the jurisdiction of the Court of Bankruptcy be set up, without the consent of the judge in Lunacy, as against the jurisdiction and the

(1) [1895] 1 Ch. 176.

administration of the judge in Lunacy? By the prerogative of the Crown, which has been exercised for centuries through the Lord Chancellor with the addition in recent times of the Lords Justices, the care of the lunatic and the disposition of his estate are vested in the Judges in Lunacy; and during the centuries in which that jurisdiction has been exercised certain rules have been laid down, and among them a rule which appears in the first instance harsh—that, notwithstanding the just claims of creditors, the lunatic must be taken care of first, that is, that he must have proper maintenance provided for him before the creditors can take a single penny. That is the law as it has been administered for a very long time indeed. As to whether a lunatic can be adjudicated bankrupt, otherwise than under the direction of the judge in Lunacy, I do not now determine that question. It is a very important one. It has been in doubt, and it will remain in doubt until it is expressly raised in a case which requires decision. It appears to me that, without in the least purporting to decide that there can be an adjudication against a lunatic, and that there has been a proper adjudication in this case—assuming that he committed an act of bankruptcy by allowing goods of his to remain in the hands of the sheriff, and that everything has been done in due order—yet that adjudication cannot in any way oust the jurisdiction of the judge in Lunacy, or interfere with any principle which has been established in that jurisdiction. So that, if there be a reasonable case for doubting that the lunatic could be properly provided for except by applying some portion of this property for his maintenance, that would be a complete answer to this application, subject only to the argument brought forward by Mr. Swinfen Eady, that the plate in question was not the property of the lunatic at all, but that it was the property of his wife, to whom he had given it before the lunacy and before the bankruptcy, but within two years of the adjudication in bankruptcy. He urged that the gift was perfectly good as between husband and wife only, and that the property comprised in it remained the property of the wife, though vested in the trustee in bankruptcy. That depends on the proper construction of s. 47 of the Bankruptcy Act, 1883, which provides that such a

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settlement as this is assumed to have been shall be—and it has been in fact admitted by the wife to have been—void as against the trustee in bankruptcy. It being, then, a void settlement, he can take nothing under it. What, then, is the alternative? It is quite plain that the Act intended that the property should come to the trustee, not as the property of the beneficiary under the settlement, but as if the settlement never had existed: that is to say, it passes as the property of the bankrupt, the lunatic. That being so, I think it is perfectly plain that the jurisdiction of the judge in Lunacy over all this property exists and cannot be ousted by an adjudication in bankruptcy, even though properly made. Therefore the ground of the application fails and the application should be dismissed.

Solicitors: *Field, Roscoe & Co.; Prior, Church & Adams.*

G. I. F. C.

C. A. 1895 *July* 30.

EARL OF SHREWSBURY *v.* WIRRAL RAILWAYS COMMITTEE.

[1895 S. 17.]

Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *ss.* 34, 35—*Compulsory Purchase—Costs of Arbitration—Award taken up and Fees paid by Landowner—Taxing Master's Certificate.*

A landowner whose claim against a railway company for the purchase-money of land compulsorily taken had been allowed, and who was entitled to the costs of the arbitration, paid the umpire's fees himself, and took up the award instead of waiting for this to be done by the company:—

Held (affirming the decision of Romer J.), that the landowner could not recover the sum paid by him to the umpire in an action against the company:

Held, also, that the decision of the taxing master who had disallowed the sum so paid by the landowner as costs in the arbitration was conclusive and was not subject to review by the Court.

APPEAL from a decision of Romer J.

Under the Wirral Railway Acts, 1885 and 1888, which incorporated the Lands Clauses Consolidation Acts, 1845, 1860, and 1869, the Wirral Railway Company had power to construct

certain railways and to compulsorily acquire lands for the purposes of their undertaking.

Under the Wirral Railway Transfer Act, 1889, and the Wirral Railway Act, 1890, the powers of the company became vested in the defendants, the Wirral Railways Committee.

On July 4, 1892, the defendants gave notice to the plaintiff that they required to purchase certain lands, of which he was the owner. No agreement was come to between the plaintiff and the defendants in respect of the compensation to be paid for the purchase and damages, and the amount was referred to arbitration in manner prescribed by the Lands Clauses Acts. The arbitrators appointed by the parties differed, and the amount was ultimately fixed by the umpire on July 11, 1894, at 11,865*l.*, a sum which entitled the plaintiff to the costs of the arbitration.

On July 14, the plaintiff paid to the umpire the sum of 410*l.* for his fees, charges, and expenses, which he demanded to be paid to him before delivering his award; and he then handed the award to the plaintiff. The defendants paid the sum of 11,865*l.* into court in the matter of the sale to the plaintiff.

The plaintiff brought in his bill of costs incurred in the arbitration to be taxed by the taxing master. The costs included the sum of 410*l.* 4*s.* 6*d.*, which the plaintiff had paid to the umpire, and his costs of attendance for the purpose of taking up the award; but the master disallowed both items, considering that they were not properly costs of the plaintiff in the arbitration.

The plaintiff then brought the present action against the defendants, claiming the payment of the sum of 410*l.* 4*s.* 6*d.* by the defendants to the plaintiff.

Romer J., by whom the action was heard, dismissed the action on the grounds, first, that the plaintiff ought to have waited for the company to take up the award and pay the umpire's fees, and that the payment of the fees by the plaintiff was a voluntary act; and secondly, that the decision of the taxing master could not be reviewed. From this judgment the plaintiff appealed.

Witt Q.C., and *T. L. Wilkinson*, for the appellant. The question mainly depends upon the effect of the 34th and 35th sections of

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the Lands Clauses Act, 1845. (1) It is admitted that the company are to pay all the costs of the arbitration in this case, and the fees of the umpire are part of the costs of the arbitration: *In re Holliday and Mayor of Wakefield.* (2) The statute does not state who is to pay the fees of the umpire in the first instance; but there is a statutory obligation on the company to pay them eventually, which can be enforced in an action. The directions given to the company to pay the umpire's fees and to take up the award were intended for the benefit of the landowner, and was not intended to preclude him from taking up the award himself if the company were remiss in doing so. Neither party could know who was to pay the costs until the award was taken up; and the company have admitted that the award was properly published in this case by acting upon it and paying the money into court, they ought, therefore, to repay the costs of the landowner in taking it up: *In re Walker and Brown* (3); *In re Autothreptic Steam Boiler Co. and Townsend* (4); *Sharpe* v. *Metropolitan District Ry. Co.* (5); *Corrigall* v. *London and Blackwall Ry. Co.* (6) The taxing master's certificate in this case was subject to a review by this Court. It would no doubt have been conclusive if he had confined himself to taxing the amounts of the items included in the bills of costs, but when he decided that the landowner was not justified in paying the umpire's fees, and that he could not claim such payment as costs

(1) 8 & 9 Vict. c. 18, s. 34: "All the costs of any such arbitration, and incident thereto, to be settled by the arbitrators, shall be borne by the promoters of the undertaking, unless the arbitrators shall award the same or a less sum than shall have been offered by the promoters of the undertaking, in which case each party shall bear his own costs incident to the arbitration, and the costs of the arbitrators shall be borne by the parties in equal proportions."

Sect. 35: "The arbitrators shall deliver their award in writing to the promoters of the undertaking, and the said promoters shall retain the same, and shall forthwith, on demand, at their own expense, furnish a copy thereof to the other party to the arbitration, and shall at all times, on demand, produce the said award, and allow the same to be inspected or examined by such party or any person appointed by him for that purpose."

(2) 20 Q. B. D. 699, 720.

(3) 9 Q. B. D. 434.

(4) 21 Q. B. D. 182.

(5) 4 Q. B. D. 645; 5 App. Cas. 425.

(6) 2 Dowl. (N.S.) 851.

in the arbitration, he was exceeding his jurisdiction, and his decision is subject to be set right by the Court.

Cozens-Hardy, Q.C., and *Macnaghten*, for the defendants. The payment of the umpire's fees was a purely voluntary act on the part of the plaintiff. He paid them at his own risk. If the company were remiss in taking up the award the plaintiff ought to have forced them to do so by mandamus. Therefore his payment is properly not included in the costs of the arbitration. The decision of this point was strictly within the power of the taxing master, who acts on such occasions not as an ordinary taxing master of the Court, but as a special officer to whom the duty is delegated by the statute, and from whose decision there is no appeal: *In re Sandback Charity Trustees and North Staffordshire Ry. Co.* (1); *In re Owen and London and North Western Ry. Co.* (2)

Witt, Q.C., in reply.

LINDLEY L.J. This is a curious action, and it is one which looking at it from a merely moral point of view, apart from legal principles, I should like to have decided in the plaintiff's favour, but I do not see my way to do so. The defendants took some land belonging to the plaintiff, under the Lands Clauses Act. There was an arbitration, a reference to an umpire, and an award; and the umpire made an award giving the plaintiff, it is true, less than he asked for, but giving the plaintiff a great deal more than the defendants had offered him for the land which they wanted. Under those circumstances it became the duty of the defendants, under the statute, to pay the costs of and incidental to the arbitration, and that included the umpire's fees and other expenses of the award. There is a method (I will read the sections presently) pointed out by the statute, which, if pursued, would have enabled the plaintiff to compel the defendants to take up that award, pay all those costs, and give him a copy of it. That is the plaintiff's right. He was under no obligation himself to pay a farthing; he had a right under the statute to compel the defendants to pay the whole of it. But he did not pursue his rights; he did not follow the provisions of the statute at all.

(1) 3 Q. B. D. 1. (2) L. R. 3 Q. B. 54.

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He had no right himself to get that award, but notwithstanding that he goes to the arbitrator and says: "If you (the arbitrator) will give me that award I will pay you 410*l*." Now he wants to make the defendants repay that 410*l*. How is he to do it? I confess, looking at it from that point of view, it appears to me that there is no obligation on the part of the defendants to reimburse him that money. It is paid for a convenience to himself, and a convenience which he had no right to obtain, but which he did obtain under the arrangement to which I have alluded.

Now, if we look at the sections, we shall see exactly what the law is. [His Lordship read the sections, and continued:—] What is the effect of those two sections? The effect is, to my mind, tolerably simple and plain. The obligation imposed upon the defendants to pay the costs is not limited or qualified or taken away by s. 35; but the combined effect of those two sections appears to be this, that the costs which the defendants are to pay under s. 34 are to be regarded as their own costs, which they must pay in order to perform the obligations imposed upon them by s. 35. That will become important when we deal with the taxing master; but I am looking now at what I consider to be the broader point—whether there is any obligation on the part of the defendants to pay the plaintiff, and obligation under the circumstances and for the reasons which I have given I can find none. But then it is put in this way: These are our costs, and inasmuch as they are our costs, and you are bound to pay them, and we have had to pay them, you are bound to reimburse us our costs. Now, if we look at it in that way, these costs have been laid before the taxing master, who was the proper officer to tax and reduce them if necessary, and he, in the exercise of his jurisdiction, has struck them out. Whether there is or is not any method of compelling him to review that taxation I do not know. It is unnecessary for us to consider. He certainly is not an ordinary taxing master. That is settled by the decision we have been referred to—*In re Sandback Charity Trustees and North Staffordshire Ry. Co.* (1)—and that there is no method of compelling him to review his taxation similar to that which

(1) 3 Q. B. D. 1.

obtains in ordinary taxation is also obvious from a discussion which took place in *Sharpe* v. *Metropolitan District Ry. Co.* (1) The point decided in the case was of a different character. The point decided there was that a person could bring an action under this statute for his costs without going to the taxing master at all; but the discussion in that case shews that the taxing-master is not to be treated as an ordinary taxing-master in an action, but as having a jurisdiction imposed or conferred upon him by the statute, and which, treating him as an inferior Court, he can be compelled to perform, either by mandamus or certiorari, when those are the proper remedies. If you look at it as a taxation of costs, then it does appear to me that the taxing master's decision, in this proceeding at all events, is incapable of review, and is against the plaintiff; but I prefer to put my judgment upon the broader base that although the plaintiff might have compelled these defendants to pay all this money in the discharge of their duty, which they have not done, he has disentitled himself from saying that they are under any obligation to him to repay him a sum of money which he chose to pay to get a document which he had no right to get. That is the broad principle on which I decide this appeal.

LOPES L.J. I feel very sorry for the plaintiff in this case, and speaking for myself, if I could have possibly seen my way to help him I would have been very glad to avail myself of it, but I fear I can see none. The real truth of the case is that the plaintiff went the wrong way to work. He had the whole matter in his own hands if he had been careful to follow the statute. He ought to have proceeded under s. 35; I mean that he ought to have held his hand and left it to the company to take up this award. If they had not taken it up in a reasonable time, he might have gone for a writ of mandamus to compel them to take it up; they would then have taken it up, they would have paid these fees, and there would have been no difficulty whatever with regard to this matter. But most unfortunately he has not followed the statute. He went to the

(1) 4 Q. B. D. 645; 5 App. Cas. 425.

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Lopes L.J.

umpire and he obtained his award, and paid some 410*l.* This was a voluntary payment. According to the statute he ought not to have paid it.

The question now is, can he in point of fact recover? I think he cannot. The effect of ss. 34 and 35 appears to me to be this, that they make the costs of the arbitration the costs of the company. But in this case we have the plaintiff paying costs which in point of fact are the costs of the company, voluntarily paying costs of the company, and then seeking to recover them back. I do not see how he can do that. It seems to me very much the same as the case which was put by my brother Rigby during the argument. I mean as if the plaintiff had voluntarily paid the costs of some of the valuers during the arbitration, and then had sought to recover that back from the defendants. I think on that ground alone this action fails.

But it appears to me there is another ground on which it also fails. It seems to me that really when this matter came before the master it was a question of costs, and the attempt which is now being made is an attempt to review his taxation. I know it is an action, but practically it is an attempt to review the taxation of the master. The master, as far as I understand the evidence, heard and considered this question of the attendance on the umpire and the umpire's fees. When he had heard and considered it, he decided that he ought not to allow those matters, and he disallowed them. If that is so, this case comes distinctly within the authority of the two cases which have been cited to us, I mean *In re Owen and London and North Western Ry. Co.* (1); *In re Sandback Charity Trustees and North Staffordshire Ry. Co.* (2) I understand those cases to come to this, that if the master allows costs to one of the parties where the statute does not give them, or disallows them where the statute gives them, the Court has no power to interfere with a master's taxation on a motion to review, because the master is not acting in the matter ex officio as the officer of the Court, but as a person named by the Act. It seems to me that the position of the master is very much the same as that of an arbitrator. He has complete power and control over the matters with which he has

(1) L. R. 3 Q. B. 54. (2) 3 Q. B. D. 1.

to deal. Even if the arbitrator decides on a matter of law wrongly, the award cannot be set aside, neither do I think here can anything which the master has done, even if he has done it wrongly, be set aside. On both grounds, therefore, I think this action fails, and the appeal must be dismissed.

RIGBY L.J. I am of the same opinion. I cannot help regretting it, because I see that by a mere mistake the plaintiff has paid a sum of money which he cannot recover. It could not be argued that this money was paid at the request of the defendants, and was recoverable on that score, and consequently the appellant frankly admitted that that could not be so. Then it was said it was a statutory debt. Let us examine that. What by the statute is given as a debt from the railway company to him? Clearly nothing more than the amount of his costs in the arbitration, and if he choses voluntarily to pay part of the costs of the railway company, he does not make them part of his costs. Sects. 34 and 35 seem to me quite clearly to make the costs of the award costs in the arbitration of the railway company, throwing no obligation whatsoever upon the landowner to pay any part of those costs. Now, this plaintiff, probably misled by the arbitrator sending to him to announce that the award was ready for him to take up, chose to take it up. He did wrongly. He had no right to do so. I do not mean to say that it was a wrong that would do any great harm to anyone, but he had no right to get the award or to obtain possession of the document at all, and the sum paid by him was money paid in order that he might have what the statute did not intend him to have.

Then in regard to the question arising out of the taxation. If these are costs of the plaintiff, the master is the proper person to deal with them. No review of that taxation can take place. The only remedy, if remedy there be, is either by a mandamus against him to consider that particular question and to tax a particular sum, or by certiorari. I do not say that he has—that such a remedy exists; but at any rate there is no remedy by review, and no right of action directly against the company;

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and it appears to me therefore that the learned judge's decision is quite right and ought to be supported, and the appeal dismissed.

Appeal dismissed.

Solicitors: *Hadden-Woodward, McLeod & Blyth; Cunliffes & Davenport.*

M. W.

C. A. 1895 *July* 30, 31; *Aug.* 1.

In re ENGLAND. STEWARD *v.* ENGLAND.

[1893 E. 396.]

Statute of Limitations—Money charged on Land—Presumption of Payment of Interest by Devisee in Fee, being also Tenant for Life of the Money—Liability of Testator's Personal Estate—Real Property Limitation Act, 1874 (37 *&* 38 *Vict. c.* 57), *s.* 8.

A testator, having covenanted with trustees for the payment of a sum of money after his death, to be held upon trusts under which his son was tenant for life, and charged the same with interest upon certain land, by his will devised the land subject to the charge to his son in fee. The money was never raised, nor any interest actually paid in respect of it; but the son entered into possession of the land, and for more than twelve years received the rents and profits:—

Held (affirming the decision of Kekewich J.), that the son not being liable to pay the interest on the charge, no presumption of payment of interest by him on the ground of any duty to keep down the charge could be made; and therefore that the claim of the trustees under the covenant of the testator against his personal estate was barred by the 8th section of the Real Property Limitation Act, 1874.

APPEAL from a decision of Kekewich J. (1)

The facts are fully given in the previous report. It will be sufficient to state here that William England, by an indenture of covenant dated September 20, 1870, covenanted with the trustees of the deed for payment to them, on or before the expiration of twelve calendar months after his death, of the sum of 4000*l.* with interest at 4 per cent., and declared that certain hereditaments known as the Hindringham Estate should be charged with the 4000*l.* and interest.

(1) Ante, p. 100.

By a settlement of even date W. England declared that the trustees should stand possessed of the 4000*l.* after his death in trust for his son Captain W. G. England for life and after his decease for his wife and children.

The settlor died on June 1, 1871, having by his will devised the estate charged with the 4000*l.* to Captain England in fee, and gave his residuary estate to his executors, Captain England and J. E. Fraser in trust for the testator's daughters and their husbands and children.

Captain England entered into possession of the estate charged with the 4000*l.*; but that sum had never been raised, and no payment of interest had been made unless such payment could be presumed from the receipt of the rents and profits by Captain England.

A summons was taken out by C. R. Steward, the surviving trustee of the settlement of 1870, on behalf of himself and all the creditors of W. G. England, against the executors and residuary legatees under the will, asking that it might be determined whether the 4000*l.* ought to be raised, and whether the residuary personal estate of the testator ought to be made liable to make it good.

Kekewich J. held that the claim against the personal estate was barred by the Statute of Limitations. The plaintiff appealed from this decision.

Ingpen, and *L. S. Bristowe*, for the appellant, contended, as in the Court below, that the receipt by Captain England of the rents and profits must be treated as payment to himself of the interest on the debt, so as to keep it alive within s. 8 of the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), and that the covenant of the testator William England was still enforceable against his assets, although no interest had been actually paid for more than twelve years. They cited *Raffety* v. *King* (1); *Burrell* v. *Earl of Egremont* (2); *Topham* v. *Booth* (3); *Corbett* v. *Barker* (4); *Lord Kensington* v. *Bouverie* (5); *Dibb* v.

(1) 1 Keen, 601, 616.
(2) 7 Beav. 205.
(3) 35 Ch. D. 607.
(4) 3 Anstr. 755.
(5) 7 D. M. & G. 134; 7 H. L. C. 557.

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Walker (1); *Roddam* v. *Morley* (2); *Coope* v. *Cresswell* (3); *Pears* v. *Laing* (4); *In re Hollingshead* (5); *In re Frisby* (6); *Forsyth* v. *Bristowe* (7); *Sutton* v. *Sutton* (8); *In re Powers.* (9)

Warmington, Q.C., and *Badcock*, for the defendants, argued that the 8th section of the Act referred to was an answer to the plaintiff's claim, there being no legal presumption, from the receipt of the rents and profits by the person who was devisee in fee of the mortgaged estate, that he paid the interest on the debt so as to keep alive the remedy under the covenant in the mortgage deed. They referred to *In re Morley* (10); *Dickenson* v. *Teasdale* (11); *Coope* v. *Cresswell* (3); *Boatwright* v. *Boatwright* (12); *Blake* v. *Gale* (13); *Fordham* v. *Wallis.* (14)

Ingpen, in reply.

LINDLEY L.J. This case is a little peculiar and involves a point that, so far as I know, has never actually arisen before, and is not governed by any of the numerous authorities to which our attention has been directed.

The appeal is against a declaration made by Kekewich J., by which he declared that "No part of the residuary personal estate of the testator, William England, is liable for the said sum of 4000*l.* by the said indenture of settlement covenanted to be paid by the said testator or any part thereof, or to make good any deficiency in respect of the said charge of 4000*l.* in case the said estates are of insufficient security for the same." The facts are set out in the report of the case before Kekewich J. (15), and I will not go through them further than is necessary to suggest how the questions of law arise. [His Lordship then shortly referred to the facts of the case and continued:—]

The position of affairs is this: after the testator's death there was clearly a right to sue upon that covenant for the 4000*l.*, a

(1) [1893] 2 Ch. 429, 436.
(2) 1 De G. & J. 1.
(3) L. R. 2 Eq. 106; 2 Ch. 112.
(4) L. R. 12 Eq. 41.
(5) 37 Ch. D. 651.
(6) 43 Ch. D. 106.
(7) 8 Ex. 716.
(8) 22 Ch. D. 511, 516.
(9) 30 Ch. D. 291.
(10) L. R. 8 Eq. 594.
(11) 1 D. J. & S. 52.
(12) L. R. 17 Eq. 71, 74.
(13) 32 Ch. D. 571.
(14) 10 Hare, 217.
(15) Ante, p. 100.

right on behalf of the trustee, as it were, to sue the executors twelve months after his death. When that sum became payable there was obviously a right on the part of the same trustee to take proceedings to have that charge raised out of the real estate. Captain England, the devisee of the estate so charged, was not liable to pay the charge, but was liable under the statutes to the amount of the value of the estate to pay it. I refer to the statute of W. & M., or the statute of Wm. 4, which has replaced it. It is important to observe that under these statutes he is liable to account to the extent of the value of the estate. I do not know if it has been decided whether the value of the estate is to be taken when proceedings are brought, or at the death of the testator; but it would seem wrong that the value at the death should be the proper value, if the payment is not enforced for long afterwards. But he is not liable to pay the money but to account for the assets.

What took place was this: the devisee naturally entered into possession of these estates devised to him in fee, and inasmuch as he was beneficially entitled to the interest of the 4000*l.* charged on that estate, no payment would be made by him to the trustee of the interest on that 4000*l.*, and of course if he had paid it, it would have come back to him in the shape of a return to him of the cheque which he paid. He is entitled to the interest, and it is very important to bear in mind that by no procedure could he be made to pay the interest on that sum. He was entitled to receive it himself, and neither he nor his executors could ever be compelled to pay one farthing of it. If anybody else had a beneficial interest in it of course he would have been liable to pay it, but there was not anybody else with a beneficial interest in it, and he was not liable to pay it. As regards the capital, he being only tenant for life, the estate of course was liable, and he was liable under the statutes to the value of the estate.

Well now, for years—a great many, more than twelve years—nothing has been done, and now this summons has been taken out, and it has been ascertained, or at all events it is apprehended, that the estate on which this 4000*l.* is charged is not, or may not be, sufficient to raise that sum, and the question

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therefore arises whether the personal estate of the testator, who was also the settlor, and the covenantor is or is not liable to pay that 4000*l.* Kekewich J. has held that it is not, and hence the appeal to us.

In the first place, one must consider what the position of affairs is as regards these statutes of limitations. In the first place, what is the statute, if any, applicable to the case? We must try it in this way: Suppose that the action were brought by Mr. Steward, the trustee of the settlement, against the legal personal representatives of the covenantor, they would plead the statute. Now, what is the governing statute? There are two possible statutes. The possible statutes are the unrepealed statute of 3 & 4 Wm. 4, c. 42, and the statute of 1874, 37 & 38 Vict. c. 57, which amended the 3 & 4 Wm. 4, c. 27, and the point as to which statute is applicable appears to me to be decided by the case of *Sutton* v. *Sutton*. (1) That case determines, whatever else it decides, that when money is charged on land, and any action, suit, or other proceeding is brought, not only to recover the money out of the land, but is brought against the legal personal representative of the covenantor, whether the covenant is contained in a deed, or as in the case before Fry J. in collateral documents, the statute which governs is now the 37 & 38 Vict. c. 57, s. 8, and to that and that alone we must have recourse.

That section says: "No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same." Now, there was a person here existing who was capable of giving a discharge or release for this 4000*l.*, that person being the trustee of that charge, Mr. Steward. There was no difficulty, therefore, in his bringing "an action, suit, or proceeding" to recover that sum; and unless the words which I am about to read apply, his action against the legal personal representative would be barred by the lapse of

(1) 22 Ch. D. 511.

twelve years. Then come these words: "Unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent." Now, what we have to ask ourselves is: Has that been done? Has there been any part payment of the principal money, or of the interest, or any acknowledgment given in writing "by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent"? That is a question of fact, and it admits of but one answer, and that answer is: "No, there has been no payment in fact, and no acknowledgment in fact." As regards the principal sum it is not contended that there has been; but it is said that, although there has been no payment of interest in fact, there has been that which is equivalent to a payment, and it is put in this way: It is argued with great ability by Mr. Ingpen that Captain England having been devisee of the estate, and also tenant for life of the charge upon it, must be deemed to have paid himself the interest—that is to say, to have paid the trustee and got the money back again. One must be careful before one substitutes what I would call a fiction for a fact. Supposing an action was brought I apprehend the statute would be relied upon as a defence, and there having been no payment in fact and no acknowledgment in writing, there would be a complete defence at law. Now, let us see what the suggested answer to that difficulty is. We are dealing with interest, because no one supposes that there has been any payment or anything equivalent to a payment of the principal. Captain England was never liable to pay one farthing of this interest. That is the cardinal point to keep one's mind on. He was entitled to interest, but was not liable himself. If, as I said, the right to the interest had been in someone else it would be a different matter. He never was liable, and therefore if you are looking for a constructive or fictitious payment of interest to himself, you cannot get it, as there was not any payment of interest by any person liable. The whole is a fiction.

That really seems to me to get rid of the whole of these cases,

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because although I quite conceive this, that if proceedings had been taken against Captain England to raise this 4000*l.* out of the land he could not set up the statute, because he has been enjoying all the devise, and all the charge; yet it does not at all follow that because he is open to that personal objection, the same objection can be made available against other persons, and there is not a single case in the books which goes the length of saying that it can. There are cases which go to shew, or tend to shew this—I am not going to criticize them—that if he had been liable to pay interest, that interest might avail against the legal personal representative. *In re Frisby* (1) is most important in that respect; but in that case the person who paid the interest was in fact liable to pay interest, and in this case there has been no payment in fact of a shilling of interest, and no person is liable to pay a shilling. That is the peculiarity of this case, and bearing that in mind, it appears to me we may make a clean sweep of all the cases that have been referred to. There is not one of them applicable, it appears to me, under the circumstances of this case. I think, therefore, that the appeal ought to be dismissed.

LOPES L.J. I do not propose to follow the points that have been taken in the judgment of Lindley L.J. I am satisfied to say that I found my decision upon this—that there has been no payment of interest in this case by anybody liable to pay. Captain England was not liable to pay a penny. He was tenant for life of this charge and devisee in fee simple of the lands, and he was entitled to put every halfpenny of this interest into his pocket. That, to my mind, would be a complete answer to the case, and I think the learned judge was perfectly right in the Court below when he held that the statute was a bar against the personal estate.

RIGBY L.J. I am of the same opinion, and I will add nothing except as to the liability of Captain England to pay interest. The Statute of Fraudulent Devises places devisees in the same position as the heir-at-law; but under that statute it has been held that the heir-at-law cannot be made accountable for any

(1) 43 Ch. D. 106.

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interest that is received by him before the issue of the writ. If he takes it and puts it into his pocket it belongs to him absolutely and entirely, and as devisees are placed on exactly the same footing with the heir-at-law, there is no power to recover from them. They would be chargeable only up to the value of the land, and for the rents which they had received before the issuing of the writ they would not be liable at all. It is plain, therefore, to me that Captain England never was liable, and giving full effect to all the decisions, including that in *In re Frisby* (1), there has been no payment within the meaning of s. 8 of the Act of 1874. Sect. 8 of the Act of 1874 has been decided by this Court to be the enactment which applies in such a matter. I have not the slightest doubt that that was absolutely in accordance with the plain provisions of the Act when they are looked into. In any event, of course, we could not consider whether it was right or wrong. We accept it, and for my part I accept it with full conviction that it was absolutely right.

Solicitors: *Rhodes & Son; S. W. Johnson & Son.*

M. W.

MIDLAND RAILWAY COMPANY *v.* GRIBBLE.

C. A. 1895 *Aug.* 6, 7.

[1894 M. 1931.]

Accommodation Work—Level Crossing for Accommodation of Intersected Lands—Severance of Ownership—Abandonment of Easement—Railways Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 20), *s.* 68.

A line of railway was made through the land of R., and pursuant to an award a level crossing was provided under the Railways Clauses Consolidation Act, 1845, s. 68, as an accommodation work, and by the conveyance to the company a right of way over it was reserved to R. and his successors in title, and the company covenanted to maintain it. Afterwards R. sold and conveyed his land on one side of the railway to P., not mentioning the crossing, and not giving P. any right of way over the land retained, nor reserving any right of way over the land sold. Afterwards the land

(1) 43 Ch. D. 106.

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retained by R. was sold to G., who insisted on his right to use the crossing:—

Held, by the Court of Appeal, affirming the decision of Wright J., that after the conveyance to P. there was no right to use the crossing, and that the company were at liberty to stop it:

Held, further, that the right to the crossing was finally abandoned by the conveyance to P., and would not be revived if the lands on the two sides of the railway should again become vested in the same person.

THIS was an appeal by the defendant from a decision of Wright J. (1)

Wright J. held that the defendant had not at present any right to use the crossing in question, and gave a judgment declaring "that the defendant is not now entitled to any right of way over the level crossing in question, nor any right to abate any obstruction placed in the way thereof," and perpetually restraining the defendant, his servants and agents, from interfering with the company's fence, and from coming on, crossing or recrossing the railway at the points aforesaid, "but the above declaration and injunction are to be without prejudice to the right (if any) of the defendant or his successors in title to exercise rights of way over the level crossing in case the defendant or his successors in title should become entitled under or as against the owners or occupiers for the time being of the other part of the several lands to pass over or use those lands in connection with or for the purposes of the occupation of their own lands."

C. G. O. Bridgeman, for the appellant. The right of way which was granted by the railway company was intended to be in perpetuity and for all purposes, and cannot be taken away from the owner of the land on either side without his consent, though it may be suspended for a time. If the landowner on the other side should grant the appellant a right of way over his land the appellant would have a right to pass across the railway to get to it; or if the appellant should purchase the land on the other side the right to cross the line would be revived. Therefore the company ought to be restrained from putting up a fence by which, in course of time, the right of way might be lost. For the same reason it is important that a declaration of the

(1) Ante, p. 129.

appellant's right should be made, which is claimed by the counter-claim: *Bower* v. *Hill* (1); *United Land Co.* v. *Great Eastern Ry. Co.* (2); *Newcomen* v. *Coulson* (3); Gale on Easements, 6th ed. pp. 143, 145.

Birrell, Q.C., and *Sargant*, for the plaintiff company. The deeds under which the two present landowners purchased their lands contain no mention of the right of way across the railway. It is not a right of way in the ordinary sense of the term. It was a right granted by the railway company as compensation for the severance of the land, and was not intended to apply to the land when the unity of possession had ceased. It was an accommodation work, the necessity for which has ceased. As to what may happen if the unity of possession should be restored, the Court will not consider what may happen at a future time: *National Guaranteed Manure Co.* v. *Donald.* (4)

Bridgeman, in reply.

[LINDLEY L.J. In 1885 your vendor neither gave any right of way over the land he retained nor reserved any right of way over the land he then sold. Was not this an abandonment?

LOPES L.J. Can a right exist under sect. 68 when the lands on the two sides have ceased to belong to the same person?]

The section is not to be looked at simply by itself, but in connection with the conveyance to the company which embodies the agreement between the parties. There was no intention of abandonment; and the company in 1893 shewed plainly that they considered the right to be subsisting. The release by Plowman of his right could not affect the defendant.

LINDLEY L.J. This case has raised a point which, so far as I know, is new; but I think it is not difficult. The defendant appeals from an order made by Wright J., which declares that the defendant is not entitled now to any right of way over the level crossing in question—that is, over the railway to which I will refer presently—nor any right to abate any obstruction placed in the way of it, and granting an injunction to restrain the defendant from using that crossing.

(1) 1 Bing. N.C. 549.
(2) L. R. 10 Ch. 586.
(3) 5 Ch. D. 133, 141.
(4) 4 H. & N. 8; 28 L. J. (Ex.) 185.

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It is necessary in the first place to state shortly the facts which give rise to this controversy. In 1855 a Mr. Raynsford was the owner of some property in Hertfordshire, which the Midland Railway Company wanted to cross, and, under the powers contained in the Lands Clauses Consolidation Act and the Railways Clauses Consolidation Act, they made their line of railway across his land, cutting it in two, he owning and occupying it as his own land on both sides of the line. Under those circumstances he required the railway company to make some accommodation works, and the accommodation works which he wanted included this crossing, not a roadway, but simply a means of getting from the land on one side of the line to the land on the other side, he being the owner on both sides; and consequently what is called a level crossing was made—a crossing which, as I understand, was nothing more nor less than a couple of gaps in the hedges with protecting gates, so that carts might go from one side of the line to the other. That accommodation work was constructed by the railway company in consequence of the enactment contained in s. 68 of the Railways Clauses Consolidation Act, 1845, which runs thus: "The company shall make and at all times thereafter maintain the following works for the accommodation of the owners and occupiers of lands adjoining the railway, that is to say, such . . . convenient gates . . . and passages over . . . the railway as shall be necessary for the purpose of making good any interruptions caused by the railway to the use of the lands through which the railway shall be made; and such works shall be made forthwith after the part of the railway passing over such lands shall have been laid out or formed, or during the formation thereof." Obviously that is to be done for the accommodation of the person through whose lands the railway passes. The words "shall at all times maintain" do not mean that the company must maintain it at all times if he does not want it. Having asked for this accommodation and got it, he could if he chose release it; and if he chose to release it there would be an end of the statutory obligation to maintain it. The maintenance of it is not a public duty; it is a duty to him privately, and, of course, to those claiming under him.

Up to 1885 Mr. Raynsford remained in the enjoyment of the land on both sides. In 1885 he conveyed the land on one side to Mr. Plowman and retained the land on the other side. Now, what was the effect of that? He conveyed the land to Mr. Plowman without granting to him any right of way over the retained land, and without reserving to himself any right of way over the land conveyed to Mr. Plowman—that is to say, he severed his land in such a way as to shew conclusively that this occupation way over the railway was no longer of any use to him, and to shew conclusively that he never intended to use it thereafter. That appears to me to be a clear and distinct abandonment of his right of way over the railway. It was no longer of any use to him; and when he severed the land without any reservation of any right of way there was an end of the right of way over the railway—he abandoned his easement. It was perfectly competent to him to do so in point of law. Ever since the great case of *Moore* v. *Rawson* (1) with regard to ancient lights the law as to abandonment of easements has been perfectly well settled. It was not an abandonment for a month or a year, but a distinct final abandonment without any intention to reserve this right of way. To my mind, upon the conveyance to Mr. Plowman without any express reservation, there was an end of the statutory right.

All that follows is unimportant. As Mr. Raynsford had no right of way to grant to the defendant's predecessor in title when the sale to him took place, we should not notice what took place in 1893 except for the reason that it has been relied on by Mr. Bridgeman. In 1893 Mr. Plowman did not want this crossing, but he wanted a siding; and the company agreed to let him have it if he would give up all right in respect of the crossing. This giving up by Plowman of a supposed right cannot possibly shew that the defendant, who was no party to the transaction, had any right.

Wright J. has put into this order words which in our opinion ought to be struck out, as it is our duty under ss. 4 and 5 of the Judicature Act, 1873, to make such order as we think the judge in the Court below ought to have made. It appears to me that

(1) 3 B. & C. 332.

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he has, by over-caution, put into this judgment words which may perhaps give rise to some expectation or some hope on the part of the defendant that he has still got, or may get, some right of way. I think in mercy to him and in justice to both parties the order appealed from ought to be varied by striking out the word "now" in the declaration, and the whole of the clause stating that the declaration and injunction are to be without prejudice. With that variation in the order the appeal will be dismissed with costs.

LOPES L.J. I entirely agree. For what possible reason Mr. Gribble wants to preserve this right of way I cannot understand. If he wants to exercise the privilege of walking backwards and forwards across the line he will do it at imminent risk from the trains passing by; and if he wants it for the purpose of going across to look over and see how the crops on the other side are growing, I can only say that that was not the object originally contemplated.

What is this passage-way? It is an accommodation work, and all the incidents of an accommodation work belong to it. It had its existence under the 68th section of the Railways Clauses Consolidation Act of 1845. An accommodation work like this passage-way is a work necessary for the purpose of making good any interruption caused by the railway to the use of the lands through which the railway is made, the lands on either side being in the occupation of the same owner. That accommodation work is made by the railway company for a special purpose, that special purpose being to maintain a communication between the lands of the same owner or occupier which have been intersected by the railway; and, in my judgment, as soon as that special purpose is at an end, and when, as Mr. Bridgeman has admitted, it is practically impossible now to use the work for that purpose, the accommodation being no longer required, the obligation to afford it also ceases.

In 1885 this happened: The land on both sides of the railway having up to that time been in the occupation of Mr. Raynsford, he sells the land on one side of the railway to Mr. Plowman. He keeps the land on the other side in his own

hands for some time, and eventually that land devolves on Mr. Gribble, who is now the owner. The grant to Mr. Plowman in 1885 was a grant of the fee simple; it was not for any limited period; it was an absolute parting with the fee, and there was no grant of a right of way on the one side of the railway, and no reservation of a right of way on the other. It was an absolute parting with the fee without any reservation of any kind; and the necessity for the accommodation work having then ceased, to my mind the obligation to afford it also ceased.

Something was said about the release by Mr. Plowman in 1893. I do not think that affects the case in any way whatever. Mr. Plowman wanted a siding, and the company did not wish to give it him; but eventually the company agreed to give it him if he would give up all rights in respect of the crossing, he having in fact no right at all in connection with it.

I think that this appeal fails, but that the order ought to be varied as the Lord Justice has suggested.

RIGBY L.J. I am of the same opinion, I do not mean to say that there could not be such a right as Mr. Bridgeman has been insisting upon—a right to go over another man's land, which still exists although it is of no immediate use to the grantee. Suppose, for instance, I want to get a right of way over two estates to a point beyond. I can bargain with the owner of the first estate for the right to go over his land up to the estate of the other, and he can grant it to me if he chooses. Such a right of way is of no immediate use to me, as it enables me only to go up to the border of the second estate, not to the point to which I wish to go; but the right to go so far is not taken away because I cannot go any further without bargaining with the owner of the second estate. But look at the nature of the right in the present case. There never was any right to use this level crossing as an independent road. It was to be used as a crossing or as a passage simply; and it is clear that if at any time before the severance the landowner had used the passage-way, not for the purpose of crossing, but for the purpose, we will say, of carting goods there without the consent of the railway company, not crossing and passing over the railway, that would have been

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a trespass. It is only when you go over for the purpose of crossing—in other words, for the purpose of passing over the railway to the land on the other side—that you have a right to go there at all; consequently, there is no easement granted and no right under the Act to use the accommodation work, except for the purpose of passing from the land on one side of the line to the land on the other. When that is made, in point of law, an impossibility, all right is gone to use the crossing at all.

In 1885 there was the conveyance of the land on one side the line to Mr. Plowman. Whether because of the crossing becoming absolutely useless on the severance of the lands—and, looking at the map, I should be disposed to think it was so, because the land on each side has a perfectly good access to a good road—or from forgetfulness, it does not matter which, there was then a deliberate act done by which the whole of the land on the opposite side of the railway was sold to Mr. Plowman without the reservation of any right over it, or the grant of any corresponding right to him of passing over the railway to come on to this land. I consider that an absolute abandonment. The law does not look to possibilities which have not been bargained for. No doubt Mr. Raynsford might have bought that land back again—he did not do so in fact; but that would not have given him a new right of way. He had abandoned what he got from the company in 1855 under the Act, under the award or under the conveyance, and he had no right from that moment to let a cart or horse go on to the level crossing at all.

I think it would be impossible to raise from the release of 1893 any argument whatever with regard to that abandonment. Mr. Bridgeman argued that abandonment must depend on intention. That to some extent is true; but if there is an intention in a man's mind which is inconsistent with his acts, his acts and not his intention must govern the matter.

I quite agree with the variation in the order suggested by Lindley L.J., and the result will be that with that variation the appeal is dismissed.

Solicitors: *Gosling, Ingleby, Royds & Rawstorne; Beale & Co.*

H. C. J.

LINFOOT *v.* POCKETT.

C. A. 1895 Aug. 7.

[1895 L. 339.]

Bill of Sale—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 10, *sub-s.* 3—*Condition not expressed in the Bill of Sale—Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43)—*Deviation from Form in Schedule.*

The plaintiff, in consideration of 100*l.* paid to him by the defendant, assigned to the defendant certain chattels, and agreed to pay to the defendant "the principal sum together with the interest then due as follows: the sum of 6*l.* on December 5, 1894, on account of interest and principal, and a like sum of 6*l.* on account as aforesaid on the 5th day of each and every succeeding month thereafter." On December 5 the plaintiff paid the first instalment, and the defendant sent him a receipt in a book, on the cover of which were printed, "Rules and regulations which are strictly adhered to." These rules and regulations contained various provisions very burdensome to the plaintiff, and which had not previously been mentioned to him. He did not assent so as to bind himself to them; but the defendant afterwards wrote to him treating the rules and regulations as part of the bargain:—

Held, by the Court of Appeal (reversing the decision of Kekewich J.), that the bargain having been complete at the time when the bill of sale was executed, and the rules and regulations being no part of it, the false statement of the defendant that they were part of the bargain did not enable the Court to hold as against him that they were part of it, and so to hold the bill of sale void as being made subject to a condition or defeasance not expressed in it:

Held, further, that the provision that the principal and interest should be repaid by equal instalments of a given amount consisting partly of principal and partly of interest was not a departure from the statutory form given in the Bills of Sale Act, 1882, so as to make the bill of sale void on the ground of its not being in accordance with that form.

The plaintiff, in October, 1894, wanted a loan, and saw in one of the London newspapers this advertisement:—

"Money lent at 5*l.* per cent. From 5*l.* to 2000*l.* Why pay more when a private gentleman desires to grant advances to male or female upon their note of hand alone in any part of England or Wales without loan office formalities? No sureties or bondsmen required. The advances can be paid back by easy instalments or remain out from one to fifteen years by paying the interest only. Call or write to the actual lender, Wilfred

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Wilberforce, Esq., 11, Stroud Green Road, Finsbury Park, London, N."

The plaintiff went to the place indicated in the advertisement, being a place where the defendant, H. T. Pockett, carried on business as a money-lender under the style of "Wilfred Wilberforce," and applied for a loan. At the first visit he was informed that it would be necessary for him to give a bill of sale on his furniture for the amount advanced. Nothing was said as to the rate of interest. At a later visit a printed bill of sale was laid before him, which he executed without reading it. By this deed, dated November 5, 1894, made between the plaintiff, therein described as the mortgagor, of the one part, and the defendant, therein described as the mortgagee, of the other part, and containing no recitals, it was witnessed that the mortgagor, in consideration of 100*l.* paid to him by the mortgagee, assigned to the mortgagee the chattels specified in the schedule thereto "by way of security for the payment of the sum of 100*l.* and interest thereon at the rate of 1*s.* in the pound per month. And the said mortgagor doth further agree and declare that he will duly pay to the said mortgagee the principal sum aforesaid together with the interest then due as follows: the sum of 6*l.* on December 5, 1894, on account of interest and principal, and a like sum of 6*l.* on account as aforesaid on the 5th day of each and every succeeding month thereafter. And the said mortgagor doth also agree with the said mortgagee that he will insure and keep the said chattels and things insured against loss or damage by fire in the full value thereof: Provided always that the chattels hereby assigned shall not be liable to seizure or to be taken possession of by the said mortgagee for any cause other than that specified in s. 7 of the Bills of Sale Act (1878) Amendment Act, 1882."

After the 100*l.* had been paid the defendant told the plaintiff that he must not move his furniture away nor deal with it until he had paid back the money borrowed, and must not change his residence without the defendant's permission. The plaintiff then said that he must pay the money back at once. Upon which the defendant shewed him the bill of sale, and told him that he could only pay it back by instalments as therein provided, with

interest at 1*s.* in the pound per month. The plaintiff protested that this was not according to the original arrangement, which he understood to be for a loan at 5*l.* per cent. per annum.

On December 5 the first instalment of 6*l.* became due, and the plaintiff paid it. The defendant sent him a receipt in a little book, on the cover of which was printed on one side a notice which was in part as follows: "Borrowers are hereby informed that they render themselves liable to be convicted of felony should they either remove their goods, chattels, or effects, or assign them by way of security to any one, or should they obtain a loan on the same elsewhere without the consent of Mr. Wilberforce; and furthermore, should any county court or other judgment be registered, or any execution be registered against them, or whenever Mr. Wilberforce considers he is likely to lose the security of the goods, chattels, or effects, the bill of sale will be immediately enforced without notice." On the other side were printed, "Rules and regulations which are strictly adhered to. (1.) The instalments are to be paid at my office as agreed, and in case of default in any payment the whole amount remaining unpaid will become due and payable . . . . (3.) Where the borrower has given a bill of sale and he desires to remove the furniture or is likely to become a bankrupt, or compound with his creditors, notice must be given to Mr. Wilberforce, either personally or in writing, three days previous to such removal, bankruptcy, or compounding, and also the receipt for rent must be sent to Mr. Wilberforce within two months after the usual quarter-days. (4.) It is absolutely necessary that each of the above rules be strictly complied with, as Mr. Wilberforce cannot be held responsible for any mistakes that may occur from neglect thereof."

On December 21, 1894, the defendant wrote to the plaintiff: "I see there is a county court judgment registered against you. I wish to know whether any execution has been levied on your furniture, so that I may take steps to protect my security. If you will refer to your instalment-book you will see that you ought to have communicated this to me."

The plaintiff thereupon consulted his solicitor, and after some fruitless negotiation commenced this action. By his statement

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of claim he alleged that he had trusted to the defendant's drawing a bill of sale in conformity with the terms of the advertisement, that the bill of sale was not read over or explained to him, and that the provisions for payment of interest at 60*l.* per cent. per annum, and for repayment only by instalments, were fraudulent and void as against him, and should be set aside; that by the notice and regulations the defendant attempted to impose conditions on the plaintiff which were not contained in the bill of sale, and that the attempted imposition of the same made the bill of sale void; and that the bill of sale was also void as being in contravention of and not in the form required by the Bills of Sale Act, 1882, by reason of interest as well as principal being included in the instalments payable, and of the instalments being spread over an indefinite period. The plaintiff claimed—(1.) a declaration that the bill of sale was void as in contravention of the Bills of Sale Act, 1882; (2.) in the alternative a declaration that the bill of sale was fraudulent and void as against the plaintiff, and should be directed to stand as a security only for the principal money thereby secured and interest at 5*l.* per cent. per annum; (3.) redemption on that footing.

Kekewich J. considered that the plaintiff could not have relief on the ground that he was induced by fraud to execute the bill of sale, for that there was no law that a document must be read over and explained to a person of competent age and understanding before he signs it. His Lordship thought, however, that the defendant, by sending a receipt for the December instalment in a book containing the printed conditions above referred to, asserted those conditions to be part of the bargain, and could not go back and say that they were not part of the bargain; that the loan, therefore, was to be treated as subject to conditions not contained in the bill of sale, and was void under the Act. His Lordship accordingly made a decree declaring the bill of sale void.

The defendant appealed from this judgment; and the plaintiff gave a cross-notice that, if the defendant on appeal was successful as to the ground on which the judge decided against him, the plaintiff would contend that the bill of sale ought to be set aside on the facts found by the judge.

Herbert Reed, Q.C., and *Arthur Powell*, for the defendant, in support of the appeal. Kekewich J. has held that the rules and regulations in the receipt-book, having been insisted upon by the defendant as part of the contract, are to be treated as having been so, and that the bill of sale is void under the Act of 1878, s. 10, sub-s. 3, on the ground that these rules and regulations ought to have been incorporated in it. But they were not part of the bargain; the plaintiff never heard of them for a month after the bargain was complete, and when he was informed of them he did not assent to them. That the defendant subsequently alleged them to be part of it cannot make the bill of sale subject to a condition or defeasance not expressed in it. *Counsell* v. *London and Westminster Loan and Discount Co.* (1) is not against us, for in that case there clearly was a collateral bargain between the parties.

[They were then stopped by the Court.]

Bramwell Davis, Q.C., and *Manby*, for the plaintiff. We contend that the lender, having printed conditions which he intends to enforce against the borrower, and insists that he is entitled so to enforce, cannot be heard to say that they are not part of the contract. The bill of sale is, therefore, to be treated as subject to a condition not expressed in it. The defendant said it was, and must be taken at his word. Borrowers in these small transactions do not usually have a copy of the bill of sale; they would go on in the belief that the bill of sale corresponded with the conditions, and the policy of the Act would be defeated. Moreover, at the time of the execution of the bill of sale, the defendant told the plaintiff that he must not remove his furniture without leave, which is a condition not contained in the bill of sale.

There is another point which was not pressed below, because it was considered to be governed by *In re Bargen* (2), which, being a decision of a court of first instance, we ask this Court to overrule. The debt is to be repaid by equal instalments, consisting partly of interest and partly of principal; and we say that this is a departure from the statutory form, which makes the bill

(1) 19 Q. B. D. 512. (2) [1894] 1 Q. B. 444.

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of sale invalid. (1) The borrower cannot without an elaborate calculation tell what he owes. In *Davis* v. *Burton* (2) it is said that one great object of the Act was to let the debtor know clearly what he has to pay. In *Goldstrom* v. *Tallerman* (3) it was held that the statutory form required the principal to be paid off by equal instalments, it being said that the words "together with interest then due" are parenthetical, and only express that beside the instalment the interest then due is to be paid. The form was held to be not departed from in *Edwards* v. *Marston* (4), for the instalments were held to be interest only, leaving the principal to be paid in a lump at the end. *In re Bargen* (5) is against us, for Vaughan Williams J. intimated the opinion that the statute contemplated mixed instalments of principal and interest. We contend that it did not. It ought, if possible, to be construed so as to require an intelligible form which cannot be used as an instrument of oppression. How long is the mortgagor to go on paying the 6*l.*? The deed does not tell him. The payments would never exactly discharge the principal and interest; and to calculate how soon 6*l.* per month would exceed the principal and interest requires a calculation which most borrowers would be utterly unable to make. (6) The

(1) 45 & 46 Vict. c. 43.

Sect. 9: "A bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void unless made in accordance with the form in the schedule to this Act annexed."

The covenant for payment in the statutory form is—

"And the said A.B. doth further agree and declare that he will duly pay to the said C.D. the principal sum aforesaid, together with the interest then due, by equal payments of £ on the day of [*or whatever else may be the stipulated times or time of payment*]."

(2) 11 Q. B. D. 537.

(3) 18 Q. B. D. 1.

(4) [1891] 1 Q. B. 225.

(5) [1894] 1 Q. B. 444.

(6) If A be the principal sum, a the monthly instalment, r the rate per cent. per month, and n the number of months in which the debt and interest will be paid off, n will be determined by the following equation:—

$$(1 + r)^n = \frac{a}{a - Ar}.$$

Taking the figures of the present case, we have—

$$\left(\frac{21}{20}\right)^n = 6.$$

$$\therefore\ n\ (\log 21 - \log 20) = \log 6.$$

$$\therefore\ n\ (1{\cdot}3222 - 1{\cdot}3010) = {\cdot}7781.$$

$$n = \frac{{\cdot}7781}{{\cdot}0212} = 36{\cdot}7.$$

So the borrower will pay 6*l.* per month for three years, at the end of which time less than 6*l.* will be due.

construction of the defendant makes it impossible to redeem without payment of all the instalments.

[LINDLEY L.J. Could the mortgagor redeem in any other way under the statutory form?]

Perhaps not, unless the mortgagee takes possession, in which case the Court can interfere. The judge below did not come to the conclusion that the plaintiff, when he executed the bill of sale, knew that it reserved interest at 5*l.* per cent. per month instead of per annum, and the plaintiff is entitled to relief on this ground: *Moorhouse* v. *Woolfe.* (1)

Reed, Q.C., and *Powell*, for the defendant. In no reported case has the objection to a bill of sale that the instalments consisted of principal and interest been upheld. The instalments in these documents are usually made to consist of principal and interest, and the form in the statute appears to contemplate payment by mixed instalments.

[LINDLEY L.J. Is not *Goldstrom* v. *Tallerman* (2) against that view?]

The judgment, if carefully considered, decides no more than that the statute does not require mixed instalments. In *Haslewood* v. *Consolidated Credit Co.* (3) a bill of sale deviating more from the statutory form than that in the present case was held good. In *Simmons* v. *Woodward* (4) the Lord Chancellor says (5): "The third point it is very difficult indeed to deal with, because it first requires to be understood, and I am not quite certain that I have yet gathered its complete meaning. It appears to be this, that whereas an example is given of the form in the schedule, in which you are to state when the instalments are to be due, and the legislature has there suggested a form in which the instalments are to be equal, therefore, unless the sum lent, together with interest (because it appears to me that the interest is an essential part of the instalments, according to the provisions both of the Act itself and of the form suggested in the Act, to give effect to the bill of sale) is capable of accurate sub-division, you cannot do it—that you cannot possibly make

(1) 46 L. T. (N.S.) 374.
(2) 18 Q. B. D. 1.
(3) 25 Q. B. D. 555.
(4) [1892] A. C. 100.
(5) [1892] A. C. 107.

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a bill of sale which shall have an unequal division of the sum lent." According to this, the instalments may be mixed; and no case is cited which decides that the instalments cannot include interest. The form cannot be construed as meaning that the instalments must be instalments of principal only, for in *Edwards* v. *Marston* (1) they were held to be interest only. In *Lumley* v. *Simmons* (2) a bill of sale containing a stipulation for mixed instalments was held good. In *Weardale Coal and Iron Co.* v. *Hodson* (3) the covenant according to its literal meaning might be taken to import that interest on the whole sum advanced was to continue payable though the principal had been reduced by the instalments. The Court of Appeal rejected that construction and held that interest was only to be paid on the principal owing. The bill of sale was held good. In the case of *In re Wood* (4), the instalments would not work out as payments of principal only and must have included interest. The words of the form in the schedule do not say that the instalments are to be all principal or all interest; they leave it open whether they are to consist of principal or interest, or both combined.

Bramwell Davis, Q.C., in reply, on the question of departure from the statutory form.

[LINDLEY L.J. How do you deal with *In re Bargen* (5) ?]

In that case there were no words stating that the instalments were on account of both principal and interest; the bill was in the statutory form, and I say that on its true construction the instalments were instalments of principal only, so that the borrower would have no difficulty in finding out when the principal was repaid. The observations of Vaughan Williams J. which go to the present point are extra-judicial.

[LOPES L.J. Why may not the statutory form be read as meaning equal instalments of principal and interest together ?]

Goldstrom v. *Tallerman* (6) is opposed to that view—which is supported by no case except *In re Bargen.* (5) In *Simmons* v. *Woodward* (7) Lord Halsbury, when he speaks of interest being

(1) [1891] 1 Q. B. 225.
(2) 34 Ch. D. 698.
(3) [1894] 1 Q. B. 598.
(4) [1894] 1 Q. B. 605.
(5) Ibid. 444.
(6) 18 Q. B. D. 1.
(7) [1892] A. C. 100.

an important part of payment of the instalments, means only to say that the interest then due must be paid at the time of the payment of each instalment. In *Davis* v. *Burton* (1) it is said: "The real principle of the form is that whatever may be the consideration for the sum of money secured by the bill of sale, a fixed sum shall be stated therein in figures and in direct terms, and that sum with rateable interest thereon shall be recovered by the holders; that interest shall be calculated up to the time when the sum mentioned as the principal amount shall be called in. The grantee must not attempt to alter the sum secured, and nothing must be added to it except by way of rateable interest. The statute does not prevent payment of the principal sum by instalments together with interest from time to time falling due; and at the time of paying each instalment interest at the agreed and named rate may be added."

LINDLEY L.J. This is an appeal from a decision of Kekewich J. declaring that a bill of sale (to which I will presently refer more particularly) is void and in contravention of the Bills of Sale Act, and that the same ought to be delivered up by the defendant to the plaintiff to be cancelled.

On November 5, 1894, the plaintiff was induced by an advertisement issued by the defendant, a person named Pockett, who trades as Wilfred Wilberforce, described as of 11, Stroud Green Road, Finsbury Park, to go and borrow money of him, and he has had good reason to repent it ever since. The plaintiff borrowed 100*l.* and signed a document by which, in consideration of 100*l.* paid to the mortgagor by the mortgagee, the mortgagor assigned to the mortgagee the chattels specified in the schedule "by way of security for the payment of the sum of 100*l.* and interest thereon at the rate of 1*s.* in the pound per month." That is 60 per cent. per annum. The advertisement was that money could be had for "5 per cent."; but 5 per cent. in a money-lender's mouth means 5 per cent. per month, and 5 per cent. in a borrower's mind means 5 per cent. per annum until he finds out what it really means; and of course when this plaintiff found out what it really meant he did not like it. However,

(1) 11 Q. B. D. 537, 540.

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that is immaterial, because it was in fact 60 per cent. It goes on: "And the mortgagor doth further agree and declare that he will duly pay to the mortgagee the principal sum aforesaid together with the interest then due as follows: the sum of 6*l.* on December 5, 1894, on account of interest and principal, and a like sum of 6*l.* on account as aforesaid on the 5th day of each and every succeeding month thereafter."

The plaintiff impeaches this document on the ground of fraud, and upon the ground that it is subject to a condition or defeasance which is not expressed in it, and is void on that ground; and there was also a point raised that it is in a form not in accordance with the Bills of Sale Act.

As far as the plaintiff's case rested upon the ground of fraud, Kekewich J. decided against him, and held that he was not entitled to relief on the ground that he had been cheated when he signed the bill of sale. I see no reason for differing from that decision, for the plaintiff was not cheated into signing the bill of sale. Although he was foolish enough to be attracted by this advertisement, he was a man of some intelligence and quite capable of reading what he signed; and as he chose to sign this document, which is perfectly clear and intelligible, that part of his case fails.

The next point, and the one which has been most urged before us, is that this document was accompanied by some condition or defeasance which was not expressed in it, and which by reason of its not being expressed rendered it void under the Bills of Sale Act, 1878, s. 10, sub-s. 3. [His Lordship read that clause.]

Now, was there any condition or defeasance which ought to have been embodied in this bill of sale? It appears to me that when the facts are understood there obviously was not. The bill of sale was executed; and up to that time no condition, no defeasance was mentioned. When it was executed the bargain was complete, and there was no condition or defeasance forming part of the bargain. After its execution there was some conversation about the plaintiff not being at liberty to remove the goods or change his residence without the lender's permission. That was not acquiesced in and was not part of the terms. It

was a statement made by the lender like some other statements to which I shall presently refer, which were made to frighten the borrower, and which form part of a system of terrorism and bullying pursued in these cases which is shocking to contemplate; but I cannot on that account hold that a conversation of that kind taking place afterwards and not part of the bargain is a condition or defeasance.

Then what happened afterwards was this. The plaintiff paid the first instalment of 6*l.*, and thereupon received a little book containing what are called "Rules and regulations which are strictly adhered to." Those rules and regulations are oppressive in the extreme, and I take the opportunity of remarking that I hope what I am saying will warn people against borrowing money of Pockett, otherwise Wilfred Wilberforce, of 11, Stroud Green Road, Finsbury Park. In a notice on one side of the book he says: "Borrowers are hereby informed that they render themselves liable to be convicted of felony should they either remove their goods, chattels, or effects, or assign them by way of security to any one, or should they obtain a loan on the same elsewhere without the consent of Mr. Wilberforce." Anything more preposterous or more atrocious than that can hardly be imagined: it is simply bullying, frightening, and lying. He goes on: "And furthermore, should any county court or other judgment be registered, or any execution be entered against them, or whenever Mr. Wilberforce considers he is likely to lose the security of the goods, chattels, or effects, the bill of sale will be immediately enforced without notice." On the other side of the cover are the "rules and regulations" which I have mentioned. [His Lordship read the 1st and 3rd of the rules.]

Now, if those rules and regulations were part of the bargain, no doubt they would fall within s. 10, sub-s. 3, of the Act of 1878; but they were not part of the bargain; and although Mr. Wilberforce said he understood them to be so, or rather said that they were actually so, I am afraid that we cannot properly retort upon him, "We will take you at your word, and hold that to be part of the bargain which never was so." He tried to bully and frighten his borrower; but we cannot on that account hold that these regulations, which were first seen by the borrower

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more than a month after the contract was complete, were in any way part of the bargain. He knew nothing about them; and I cannot accede to the suggestion that we ought to hold them as conditions of the bargain merely because one party asserted that they were so, when the other side had never heard of them. We could not so hold in a case where the parties concerned were two honest people, and I do not think that the fraudulent character of the person who makes the assertions alters the case.

Then comes a totally different point. It has been argued before us, and I was at first struck by the argument, that this bill of sale was void as not being in accordance with the form in the schedule to the Act of 1882. The objection urged is that by mixing up as this bill of sale does the principal and the interest together, and making the whole debt consisting of principal and interest payable by equal instalments of 6*l.* monthly, the borrower cannot without a troublesome calculation, which most borrowers are incapable of making, find out when he has paid off his security.

Unquestionably this is a serious matter to borrowers, because such a document as this in the hands of unscrupulous men like the defendant might be used for the purpose of gross oppression. I feel that very strongly; but it does not follow of course that on that ground we can hold this bill of sale to be void. The first thing we have to do is to construe it; and we must construe a bill of sale as we would construe any other instrument, that is, with the view of understanding it in reference to the transaction to which it relates. The transaction is one for lending money—it is a loan transaction, and although the principal sum and interest is to be repaid by instalments of 6*l.* each, if when you come to the last instalment there is not so much as 6*l.* due, the borrower must pay what is due. I think that is the obvious construction to be put upon it. But it has been urged that that does not get over the difficulty, because you cannot find out when the loan is at an end—when the principal has been paid off; and at first I thought that was a serious matter. But when we look closely at the form in the schedule to the Act of 1882, I do not think we can go as far as to say this bill of sale is void as not being in accordance with it. The form

given in the schedule runs thus: [His Lordship read the form in the schedule.]

There is no time specified there when the payments are to cease; but if you construe this document as Fry L.J. did in the case of *Goldstrom* v. *Tallerman* (1), and read it as a contract to pay the principal and interest by equal instalments, each composed of the interest then due and a part of the principal, you can ascertain by a not very difficult calculation how much principal you have paid off and how much you ought still to pay. But still a calculation has in any event to be made, and I cannot say that a bill of sale is void because that calculation is made a little more troublesome. I think that is a sound principle to go on, and I observe that Lord Halsbury in *Simmons* v. *Woodward* (2) says it appears to him that interest is an essential part of the instalments. It would seem from this that the then Lord Chancellor did not quite adopt the construction put upon the form by Fry L.J.; but whether that is so or not, in the face of that, and of the other decisions which have been referred to, I do not think we could say that because a bill of sale requires a little more calculation than the form in the schedule it must necessarily be void under the clause in the Act which says that bills of sale shall be void if they are not in accordance with that form. It is impossible to say that the form precludes a loan upon the terms that the principal and interest shall be paid together by equal instalments, though the construction is not so clear as at first sight appears. What we are asked to say is that a bargain such as this, which is common in building societies, makes a bill of sale necessarily void. We are not prepared to go that length.

I do not think it is necessary to refer at any length to the authorities which have been cited. The cases of *Goldstrom* v. *Tallerman* (1) and *Edwards* v. *Marston* (3) are not very difficult to deal with, because you can find out what the payments are without much difficulty as regards principal and interest. In the case before Vaughan Williams J., *In re Bargen* (4), the terms were a little different, there being no provision that the

(1) 18 Q. B. D. 1.
(2) [1892] A. C. 100, 107.
(3) [1891] 1 Q. B. 225.
(4) [1894] 1 Q. B. 444.

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instalments were to be on account of interest and principal; still it is quite obvious from the reasoning of that learned judge that he was of opinion—and I think he was right—that you cannot pronounce a bill of sale which is otherwise unobjectionable to be void because it necessitates a calculation a little more difficult than that which must be made if the form given in the schedule is adopted.

For these reasons I am of opinion that this appeal must be allowed.

LOPES L.J. I am of the same opinion. I am bound to say that if it could be done legally I should like to declare this bill of sale void; but after much consideration I fear that it is not possible to do so.

Several points were taken before the learned judge in the Court below. It was contended that this bill of sale was obtained by fraud. The learned judge heard evidence upon that matter, and came to the conclusion that that point was not established, and I think he was right in so holding; because it is impossible to say, having regard to the circumstances, that the borrower was deceived by the bill of sale. He was an intelligent person, able to read and write, and able to understand what he read; he had an opportunity of reading the bill of sale and of forming his own opinion with regard to its effect, and he signed it. It is impossible, therefore, to say that he was induced by fraud to sign and become a party to that bill of sale.

Then another point was taken—that the bill of sale was void on the ground that it was subject to a condition or defeasance such as is contemplated by the Act of 1878, s. 10, sub-s. 3. I think that means a condition or defeasance which is part of the bargain, and here, as far as I can discover, it is impossible to say that there was any condition or defeasance which was part of the bargain. It is said there was a certain conversation at the time the bill of sale was executed, not before it was executed, but afterwards, and when the money had been paid. I do not think that anything which was said in the course of that conversation can be held to be part of the bargain. It was merely a conversation between the borrower and lender in which the lender

tried to terrify and bully the borrower. Then it was urged that a book was sent which contained rules and regulations, and that they formed part of the bargain, for that by subsequent letters the lender asserted that they were part of the bargain. I cannot come to the conclusion that they can be treated as part of the bargain. That book did not come to the knowledge of the borrower until a month after the bill of sale had been executed; until then he had never heard of it; and in my opinion he never assented in any way which would have been binding upon him to any one of the terms which are contained in that book. The sending those rules and regulations was in my opinion a most disgraceful attempt to intimidate the borrower; but to say that the rules and regulations amount to such a condition or defeasance as is contemplated by s. 10 of the Act of 1878 is impossible.

Another point, however, has been raised which is more difficult to deal with. It is said that the bill of sale is bad in not complying with the statutory form. It was put in this way—that the clause in the bill of sale which provides for repayment of the loan mixes up principal and interest in a way which makes it difficult to understand what portion of each equal instalment is attributable to principal and what to interest—difficult to say when the debt or loan would be paid off—difficult to know on what terms the borrower might redeem. It was said that all this is so ambiguous, so uncertain, and so embarrassing and confusing, that it amounts to a deviation from the statutory form, and therefore renders the bill of sale bad. It was also urged that it was impossible to pay off the principal and interest by equal instalments of 6*l*. At first I was rather struck with that difficulty; but on consideration I do not think much of that point, because, assuming the amount due to be reduced to less than 6*l*., the payment of that less amount would suffice according to the cases which have been brought to our notice.

Does, then, the fact that the form of this bill of sale renders a more elaborate calculation necessary than would be required under the statutory form make the bill so deviate from the statutory form as to render it invalid? In my opinion it does

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not. It is impossible to say that even where there is a literal observance of the statutory form some calculation will not be involved. In the present case a rather more complicated calculation would have to be made; but I do not think that is enough to render a bill of sale bad. I adopt the opinion expressed by Vaughan Williams J. in *In re Bargen* (1), where he said: "The statutory form contemplates that the principal sum together with the interest then due may be paid by equal instalments covering principal and interest, and the fact that it was decided in *Goldstrom* v. *Tallerman* (2) that the instalment may be limited to principal does not shew that the instalment may not cover principal and interest."

In conclusion, I feel therefore that it is impossible to set this bill of sale aside, and I again say I am very sorry for it. All I can say is that I should recommend all intending borrowers to avoid Mr. Pockett, alias Wilberforce, in the same way as they would avoid the pestilence; and at the same time I have no hesitation in saying that I think he is a champion specimen of an unprincipled money-lender.

RIGBY L.J. I am of the same opinion. With regard to the point of fraud, I do not think there was any fraud in the procuring of the contract. I think there was fraud attempted in reference to the rules and regulations, which Wilberforce knew as well as anybody else were not part of the contract. In that attempt, and in the unprincipled way in which he put them forward as part of the contract, I think there was fraud, though I do not see that it succeeded, because the borrower upon taking advice was able to see that this was an attempt to impose upon him, and he was not really imposed upon. A stipulation which was not made known to the other side cannot be a condition within the meaning of the Act, and the putting forward of those rules and regulations after the bill of sale had been executed and the money advanced would not make them part of the contract. I think, therefore, that the bill of sale cannot be set aside on the ground that it was subject to a condition which does not appear on the face of it.

(1) [1894] 1 Q. B. 444, 447. (2) 18 Q. B. D. 1.

With reference to the point that the bill of sale departed from the statutory form, I should not have been sorry to find this a valid objection. But we are bound, of course, to administer the law and to construe the document, and not strain its construction against one of the parties because we disapprove of his conduct; and I think there is nothing contained in the form given in the schedule to the statute which could prevent an instrument in the form we have here taking effect as a bill of sale.

I cannot quite follow Mr. Bramwell Davis's argument upon the case of *Goldstrom* v. *Tallerman*. (1) Fry L.J. there says: "It is suggested that the form here requires the computation of the whole interest on the principal at once, the addition of this sum to the principal, and the division of such total sum into the stipulated number of instalments." That case is very like the present case—like it, I think, in all respects, except that in the present case no number of instalments is specified. Then he rejects that construction, but does not say, as I understand him, that it is improper to include principal and interest in one instalment, but that the form does not require it to be done, and he gave us a reason: "We think the words 'together with interest then due' are parenthetical." Probably they are; but whether they are parenthetical or not, I see no decision here that it would not be legal—that it would be a substantial departure from the form in the schedule to take principal and interest into account at once, and to make the loan repayable in the way in which building societies' loans are very generally made repayable.

There remains only the objection, which weighed upon me a good deal at first, that it would require a somewhat difficult calculation, which in fact a vast number of people entering into these small transactions would not be able to make, to ascertain when the loan was paid off. But as it has been pointed out, it is not quite a simple thing to calculate interest upon the statutory form, and there are a vast number even of fairly intelligent people who could not do it to save their lives, but would have to get assistance; and I certainly cannot adopt as a principle that because in this case the arithmetic would be

(1) 18 Q. B. D. 1, 5.

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somewhat more difficult there is therefore a substantial departure from the form given in the schedule. The contract comes to this—that the debtor is to pay the instalments of 6*l.* until there comes a last instalment which is less than 6*l.*, and that when he has come to that he must pay that last instalment though it is not 6*l.* It seems to me that that is the businesslike way of dealing with the contract, and I am unable to find that there is anything in it on which we can say that this bill of sale is void.

The appeal was allowed and the action dismissed without costs, the appellant having the costs of the appeal.

Solicitors: *W. J. Greig; R. Aylward.*

H. C. J.

CRICHTON *v.* CRICHTON.

NORTH J.

1894

[1891 C. 2729.]

Dec. 4, 5, 6, 7, 8, 11, 12.

Trust—Breach of Trust—Following Trust Funds—Satisfaction—Portion.

1895

Aug. 9.

Part of the proceeds of trust funds appropriated by a father were made subject to the marriage settlement of his son, a beneficiary in remainder, who was ignorant of the source of the settled property:—

Held, that the son's representatives were only entitled to have his share of the trust funds replaced after deducting the value of the proceeds settled.

A debt due from a father to a son is not satisfied, in whole or in part, by a gift of less amount, or contingent, or uncertain in nature.

The reversionary interest of a beneficiary under the marriage settlement of his father in funds that came to the hands of the father, *held*, not to be a portion so as to be satisfied pro tanto by a payment from the father of less amount.

THIS was an action against the executors of a trustee to compel them to make good appropriated trust funds.

The funds in question were settled by a deed dated February 8, 1832, made in contemplation of the marriage of the Rev. W. J. Crichton with Miss Ann Clutterbuck; they consisted of the sum of 10,857*l.* 13*s.* 7*d.* 3 per cent. Reduced Annuities and 9746*l.* 13*s.* 4*d.* 3 per cent. Consols, the property of the wife. The funds were vested in four trustees, on trust to pay the income to the wife for life for her separate use without power of anticipation; and after her death to the husband; and after the death of the survivor for such issue of the marriage as the husband and wife by deed, or the survivor by deed or will, should appoint; and in default of appointment for the children of the marriage in equal shares.

One of the trustees, John Clutterbuck, survived the other three trustees, and died in July, 1863, and the trust funds, which remained in their original state of investment, became vested in his executors, namely, the Rev. W. J. Crichton, then tenant for life in remainder, and the widow of the surviving trustee. The widow of John Clutterbuck allowed her co-executor to have entire control of the trust funds, and he sold them

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and appropriated the purchase-money to his own use. She died in 1884.

There was issue of the marriage two children only: Arthur William Crichton, who was born February, 1833, and married in May, 1867, and died in February, 1882; and Henry Benyon Crichton, who was born March, 1835, married in 1863, and died in September, 1889.

The power of appointment contained in the settlement was never exercised. Anne Crichton, the tenant for life, died in February, 1887. The Rev. W. J. Crichton married in 1888 a second wife, who survived him.

The action was commenced by the widow of Arthur William Crichton, his sole executrix, and the widow and two sons of Henry Benyon Crichton, his executors, against the Rev. W. J. Crichton, then tenant for life under the settlement, to compel restitution of the misappropriated trust funds. He died in December, 1891, and his executors—his widow Alice Margaretta Crichton, his grandson Lewellyn Dilbury Crichton and Edward Neale—were added as defendants, and the action was continued against them.

Edward Neale defended separately; the other defendant executors by their statement of defence pleaded that the liability of their testator to his sons to replace the misappropriated trust funds had been satisfied by certain advances made to them by way of marriage settlement and otherwise.

The settled Consols were sold in February, 1864; the purchase-money was received by the Rev. W. J. Crichton, and reinvested by him in certain India and Russian Stock, which were placed in the names of himself and his wife.

The settled reduced annuities were sold in July, 1865; the purchase-money was received by the Rev. W. J. Crichton, and was reinvested in 3000*l.* Brazilian Stock placed in the name of himself and wife, and 4000*l.* India 5½ per cent. Stock and 4000*l.* London and St. Katharine Dock Stock; both of these were placed in the name of himself and his son Arthur William Crichton. The son received the income of the India Stock during his life, and the capital went to the father by survivorship. The 4000*l.* London and St. Katharine Dock Stock was, on

the occasion of the marriage of Arthur William Crichton, together with other stocks belonging to the father, transferred to the trustees of the marriage settlement of Arthur William Crichton.

The judge held on the evidence that there was nothing to shew that Arthur William Crichton knew what was the nature or subject of the 1832 settlement, or that there had been any dealing with the trust funds comprised therein, or even that he knew what was the source from which the price of the stocks placed in the name of himself and father was derived; further than that, his father found the money.

The advancement to Arthur William Crichton relied on as satisfaction consisted of the transfer of stocks to the trustees of his marriage settlement and the placing by the father of the 4000*l.* 5½ per cent. Indian Stocks purchased out of the proceeds of the trust funds and certain Russian Stock in the joint names of the father and Arthur William Crichton. These stocks survived to the father.

The advancements to Henry Benyon Crichton relied on as satisfaction comprised, in addition to his marriage settlement, the placing by the father of certain stocks at different times, in the names either of himself and his son Henry, or of himself, his son Henry, and his son Henry's wife. These various stocks were dealt with by the father from time to time: as to some part—namely, to the extent of 4801*l.* 7*s.* 6*d.*—Henry ultimately received the capital proceeds; as to other part the father received the capital; and as to other part Henry's widow took the capital by survivorship.

The father, in the year 1886, caused an estate called Broadwood Hall to be conveyed to his son Henry Benyon Crichton with the object of giving the latter a qualification as justice of the peace for the county of Radnor. The estate had been sold by the executors of Henry Benyon Crichton for 7000*l.* The defendants alleged that Henry Benyon Crichton was a trustee for his father of the Broadwood Hall estate, and submitted that any sums which the defendants were entitled to retain out of the 7000*l.* must be taken in satisfaction or part satisfaction of any claim of Henry Benyon Crichton under the settlement. Anne Crichton during her life received, out of funds voluntarily

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provided by her husband, a separate income larger than she would have had out of her settlement funds if they had not been thus appropriated.

Everitt, Q.C., and *Stock*, for the plaintiffs. Henry's marriage settlement was made before the father incurred any liability, and could not be a satisfaction of that liability. The circumstances relating to the treaty for Arthur's settlement shew that no interest or property of Arthur was intended to be affected.

None of the various securities placed in the joint names of the father and either son, or of the father and Henry and Henry's wife, was equal in value to the share each son was contingently entitled to under the father's settlement; and no satisfaction of a debt pro tanto is presumed: *Plunkett* v. *Lewis* (1); *Tolson* v. *Collins*. (2)

The interests the sons respectively took in such securities and the estate Henry took in realty were of such different nature from the interests they had under their father's marriage settlement that no satisfaction of the father's liability in respect of his settlement funds can be presumed: *Belasis* v. *Uthwatt* (3); *Batstone* v. *Salter* (4); *Davys* v. *Boucher*. (5)

Even if the interests of the sons could be treated as portions, the doctrine of satisfaction would not apply, for in respect of portions the equity only arises between the children: *Lee* v. *Head* (6); *Ford* v. *Tynte* (7); *Meinertzagen* v. *Walters* (8); *Noel* v. *Lord Walsingham*. (9)

Cozens-Hardy, Q.C., *Swinfen Eady, Q.C.*, and *Micklem*, for the defendants Crichton. The evidence shews that the father intended the various benefits he conferred on his sons and his wife to be taken in satisfaction of his liability to replace the trust funds. The circumstances of this case are similar to those in *Plunkett* v. *Lewis* (1), where satisfaction was presumed.

The benefits coming to the sons under their father's marriage settlement were in the nature of portions, and therefore could

(1) 3 Hare, 316.
(2) 4 Ves. 483.
(3) 1 Atk. 426.
(4) L. R. 10 Ch. 431.
(5) 3 Y. & C. Ex. 397.
(6) 1 K. & J. 620.
(7) 2 H. & M. 324.
(8) L. R. 7 Ch. 670.
(9) 2 S. & S. 99.

be satisfied pro tanto by smaller gifts: *Bengough* v. *Walker* (1); *In re Lawes* (2); *In re Vickers* (3); *Kirk* v. *Eddowes.* (4)

The 4000*l.* St. Katharine Dock Stock settled on Arthur's marriage was part of the actual trust property appropriated; he cannot, therefore, having received the benefit of that stock, call on the trustee to replace the trust fund without accounting for the value of that stock.

Samuel Hall, Q.C., *Curtis Price*, and *Wright Taylor*, for the defendant Neale.

Everitt, Q.C., in reply. Arthur Crichton had no knowledge of any breach of trust, or whence the funds provided by his father on his marriage came; therefore, as to the 4000*l.* St. Katharine Dock Stock, his position was not affected by the fact that the money with which that stock was bought has been traced to the appropriated trust funds.

1895. Aug. 9. NORTH J., after holding that Henry's settlement, being made before the liability of the father existed, could not be a satisfaction of such liability, decided that there was no satisfaction in whole or in part of the liability to Arthur by reason either of the transfer of stocks into the joint names of the father and Arthur, or by his marriage settlement. In the course of his judgment he said:—There are numerous cases which shew that a debt of a father to a child may be satisfied by an advance to the child of equal or greater amount, whether in the father's lifetime or by his will: see *Plunkett* v. *Lewis* (5), a case of a debt being satisfied by a marriage portion; *Talbot* v. *Earl of Shrewsbury* (6), a case of satisfaction by a legacy. But there is a leaning against any presumption of satisfaction in such cases; and there are many exceptions to this general rule. If, for instance, the amount advanced is less than the debt, there is no satisfaction even pro tanto: *Cranmer's Case* (7); *Graham* v. *Graham* (8): see, too, *Lady Thynne* v. *Earl of Glengall.* (9) Each of the

(1) 15 Ves. 507.
(2) 20 Ch. D. 81.
(3) 37 Ch. D. 525.
(4) 3 Hare, 509.
(5) 3 Hare. 316.
(6) Prec. Ch. 394.
(7) 2 Salk. 508.
(8) 1 Ves. Sen. 262.
(9) 2 H. L. C. 131, 153.

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sums advanced to Arthur was less than the amount of the father's liability to him; therefore, even if they had been advanced irrevocably, they would not have been any satisfaction. Again, there is another exception to the rule, within which also the present case falls, namely, where the debt is certain, and the alleged satisfaction is contingent or uncertain, even though of greater amount than the debt. There are many illustrations of this in the cases where a legacy made payable *after* the death of a testator is held not to be a satisfaction of a debt payable *on* his death: as to which see the recent decision of Stirling J. in *In re Horlock* (1), and cases there cited. [The learned judge then read the judgments in *Mathews* v. *Mathews* (2) and *Talbot* v. *Earl of Shrewsbury* (3), and proceeded:—] If there is no satisfaction where the contingency does take place, a case like the present, where it does not happen, is an a fortiori one. These authorities are conclusive. I cannot understand how the father's debt or liability to the son could be satisfied by investments in the joint names which ultimately survived to the father, the debtor; nor how the son's certainty of succeeding ultimately to one moiety of the settled funds (in default of an appointment which never was, and the father contemplated never would be, made) could be satisfied by giving him a chance of succeeding to something else; and that, too, of less value and smaller amount.

But though I think it clear that Arthur's settlement was not a satisfaction in whole or in part of the father's liability, the fact that 4000*l.* of the dock stock settled arose from the investment of 2885*l.*, part of the Reduced Annuities, is not immaterial. The sons Arthur and Henry and their representatives, complaining of the conversion and appropriation by their father of the proceeds of the securities originally settled, are entitled to follow the proceeds of the conversion, and, so far as such proceeds cannot be traced, to recover from the father's estate the loss arising from their misappropriation; but, as it has been proved that this part of the proceeds by the improper conversion came into Arthur's hands, his representatives cannot claim it over again

(1) [1895] 1 Ch. 516. (2) 2 Ves. Sen. 635.
(3) Prec. Ch. 394.

from the father's estate, but must be treated as having received that amount: see *Nail* v. *Punter* (1); *Evans* v. *Benyon*. (2)

[Having also held that the transfers of stocks into the joint names of the father and Henry, and of the father, Henry, and Henry's wife, did not effect satisfaction of the father's liability to Henry, his Lordship proceeded:—]

With respect to these sums, one plausible argument was put forward by Mr. Cozens-Hardy which I ought not to pass without notice. It was said that what Henry was entitled to under the 1832 settlement was a portion: that, although satisfaction of a debt cannot be presumed even pro tanto from a subsequent legacy or gift of lesser amount, the law is different as to portions: that a portion may be partially satisfied by a subsequent provision of lesser amount; and therefore Henry's claim to his original portion is answered pro tanto by the 4801*l.* 7*s.* 6*d.* actually received by him. This contention seems to me not well founded. Call Henry's share a portion, if you will; it was not a portion provided by the father, or for which he or his estate was in any way liable. The liability of his estate merely arises from the fact that he, as trustee, received the trust money, and became a debtor for the amount: and the legal doctrine invoked by the defendant's counsel does not apply.

Solicitors for plaintiffs: *Mullens & Bosanquet.*
Solicitors for defendant Neale: *Nye & Moreton.*
Solicitors for other defendants: *Nield & Strouts.*

(1) 5 Sim. 555. (2) 37 Ch. D. 329.

D. P.

STIRLING J.
1895
June 22, 29;
July 2, 23.

In re LONDON AND NEW YORK INVESTMENT CORPORATION.

[1895 L. 050.]

Company—Reduction of Capital—Founders' Shares, Extinguishment of—Confirmation by the Court—Companies Acts, 1862 (25 & 26 *Vict. c.* 89), *s.* 53; 1867 (30 & 31 *Vict. c.* 131), *s.* 11; *and* 1877 (40 & 41 *Vict. c.* 26), *ss.* 3, 4.

An investment company, whose capital was divided into founders', preference, and ordinary shares, had by depreciation in the value of its investments suffered a considerable loss of capital, and there appeared to be no reasonable prospect of anything ever coming to the holders of the founders' shares, either in respect of capital or dividend. By the constitution of the company the founders' shares were, in the event of liquidation, to bear in the first instance losses of capital. The memorandum of association provided that preference shares might be issued on such terms as the company should by special resolution determine. Shares preferred both as to capital and dividend were issued by the directors without any special resolution having been passed; but at meetings subsequently held and attended by all classes of shareholders resolutions were unanimously passed adopting the terms under which the preference shares were issued. The company presented a petition for the confirmation by the Court of resolutions for reduction which involved the total extinction of the founders' shares and threw the remainder of the loss upon the ordinary shares:—

Held, (1.) that the issue of the preference shares without the passing of a special resolution, was capable of ratification by the company and had been ratified; and (2.) that the scheme of reduction was not unfair and ought to be sanctioned.

British and American Trustee and Finance Corporation v. *Couper* ([1894] A. C. 399), *Bannatyne* v. *Direct Spanish Telegraph Co.* (34 Ch. D. 287), and *In re Floating Dock Co. of St. Thomas* ([1895] 1 Ch. 691) applied.

THIS was a petition presented by the London and New York Investment Corporation, Limited, asking for the sanction of the Court to certain resolutions which had been passed for the reduction of its capital, on the ground that paid-up capital to the amount of 251,000*l.* had been lost. The company was registered under the Companies Acts on October 11, 1889. It was an investment company, its main object being, as stated in the memorandum of

association, "To raise money by share capital, and invest the amount thereof in, upon or otherwise to acquire and hold" certain specified classes of securities. By the memorandum of association the capital was fixed at 1,000,000*l.*, divided into 100,000*l.* shares of 10*l.* each. Of these, 200 were to be founders' shares, 50,000 were to be preferred shares, and the remaining 49,800 were to be ordinary shares. All this capital had been issued and was fully paid up.

The memorandum of association, clause 7 (B), provided "There shall first be paid out of the net profits of the company in each year to the holders of the preferred shares a cumulative preferential dividend at a rate not exceeding 5*l.* per cent. per annum on the amount paid up thereon for the time being." And subclause (F) provided: "Any of the original shares, and any new shares from time to time to be created, may (but subject always and without prejudice to the rights of the holders of the founders' shares, who shall in each and every year receive their interest or dividends as herein expressed) from time to time be issued with any such guarantee or any such right of preference, whether in respect of dividend or of repayment of capital, or both, or any such other special privilege or advantage over any shares previously issued or then about to be issued, or at such a premium or with such deferred rights as compared with any shares previously issued or then about to be issued or subject to any such conditions or provisions, and with any special right or without any right of voting, and generally on such terms as the company may from time to time by special resolution determine."

By art. 7 of the articles of association it was provided: "The founders' shares shall entitle the holders thereof to such dividends and other interest in the profits of the company as is defined by the memorandum and articles of association; but except in the case of liquidation they shall not entitle the holders thereof to any share in the capital of the company beyond the actual amount paid up or duly credited as paid up upon them."

Art. 10 provided as follows: "Subject to the memorandum of association the shares shall be under the control of the directors, who may allot or otherwise dispose of the same to such persons,

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on such terms and conditions, and at such times as the directors think fit."

By art. 120 it was provided: "The business of the company shall be managed by the directors as herein provided, and all such powers of the company as are not by statute or by these presents required to be exercised by the company in general meeting are hereby vested in the directors pursuant to these articles, subject nevertheless to such regulations as may be from time to time duly prescribed by the company."

And by art. 169 it was provided: "In any winding-up of a company the holders of founders' shares shall be entitled (as between themselves and the holders of preferred and ordinary shares) to one moiety of any assets of the company remaining after the payment and discharge of the debts and liabilities of the company and the repayment to the holders of preferred and ordinary shares of the amount paid up, or credited as paid up on such shares, together with the costs of winding-up."

The prospectus under which the ordinary shares were issued on October 12, 1889, contained the following statement: "It is proposed hereafter to issue 50,000 preference shares of 10*l.* each (preferred both as to capital and dividend) carrying such rate of interest not exceeding 5*l.* per cent. as the directors may determine." The ordinary shares having been issued in June, 1890, the directors passed a resolution for the issue of 5 per cent. preference shares, and for this purpose on June 20, 1890, they issued a further prospectus, which contained the following statement: "These shares are preferred as to capital, and are entitled to a cumulative dividend of 5*l.* per cent. per annum in advance of the ordinary shares." Before the issue of these preference shares no special resolutions sanctioning such issue were passed. Shortly after the issue of the preferred shares difficulties arose as to enforcing the payment of calls on a large number of them, and such last-mentioned shares became, or were likely to become, liable to forfeiture. For the purpose of avoiding the necessity of forfeiture the directors of the company determined to accept surrenders of such shares; and the same were accordingly surrendered to the extent altogether of 6550 shares, and cancelled. Subsequently some of the preference shareholders, having dis-

covered that no special resolutions had been passed to give them their promised preference as to capital, demanded that this should be done, and the directors determined to convene extraordinary general meetings of the company to put this right. Accordingly by special resolutions of the company duly passed and confirmed by the requisite statutory majorities at extraordinary general meetings of the company duly held on April 27, 1893, and May 15, 1893, it was resolved as follows, that is to say: "(1.) That the cumulative preferential dividend of 5*l.* per cent. per annum, payable under the memorandum of association of the corporation to the holders of the 50,000 preferred shares, be at the rate of 5*l.* per cent. per annum. (2.) That as against both the founders' shares and the ordinary shares of the corporation such preferred shares shall confer a right to priority in the return of capital upon a winding-up of the corporation or otherwise; but such preferred shares shall not confer or have any other rights or interest in the distribution of the surplus assets of the corporation."

Both the original resolution and the confirming one were passed unanimously, and there were present, personally and by proxy, a considerable number, on both occasions, of holders of ordinary and founders' shares. At the first meeting there were present, in person and by proxy, the following shareholders, representing the following shares, that is to say, in person, 18 ordinary shareholders, 8 preference shareholders, and 3 founders' shareholders, representing 1134 ordinary shares, 3166 preference shares, and 8 founders' shares; and by proxy, 351 ordinary shareholders, 275 preference shareholders, and 18 founders', representing 10,166 ordinary shares, 16,463 preference shares, and 37 founders' shares.

From the commencement of the company down to the year 1894 dividends had been paid regularly at 5 per cent. to the holders of the preference shares. Upon the ordinary shares the following dividends had been paid: in 1890, a dividend at the rate of 8 per cent.; in 1891, a dividend at the rate of 7 per cent.; in 1892, a dividend at the rate of 5 per cent.; and, for the first half of 1893, a dividend at the same rate—5 per cent. Since then no dividend had been paid. On the founders' shares

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nothing had been paid since the first year, when the holders received a sum equivalent to 1 per cent. on the ordinary shares. In October, 1894, the directors obtained a general valuation of the securities and investments held by the company.

The result was to bring out a loss of 251,000*l.*; and of this loss a portion did not rest on valuation, but had actually occurred through sales of shares; the amount of that actual loss, so realized, being 73,397*l.* 6*s.* 4*d.*, which was included in the 251,000*l.* A second valuation was made four months later, as on February 28, 1895, with the result that there was found to be substantially no difference in the position of the company.

Special resolutions were then passed by the company, to which the sanction of the Court was now asked. The material resolution was as follows: "That the capital of the London and New York Investment Corporation, Limited, be and the same is hereby reduced from 1,000,000*l.* divided into 100,000 shares of 10*l.* each, of which 200 are founders' shares, 50,000 preference shares, and the remainder are ordinary shares, to 749,000*l.*, divided into 50,000 preference shares of 10*l.* each, and 49,800 ordinary shares of 5*l.* each, and that such reduction be effected by cancelling as capital which has been lost or is unrepresented by available assets the following paid-up capital, that is to say, (1.) The whole of the 10*l.* per share paid up on the 200 founders' shares, and (2.) 5*l.* of the 10*l.* per share paid up on each of the ordinary shares." The loss, therefore, according to the resolution, was made to fall, in the first place, on the holders of the founders' shares, and, in the second place, on the holders of ordinary shares. The petition was opposed by one holder of ordinary shares to the number of thirty, and by three holders of founders' shares; and the question was whether the Court ought to sanction the resolution thus passed.

It appeared from a balance-sheet that was put in evidence that in order to pay the dividends on the preference and ordinary shares a sum of 56,500*l.* was required, while the present investments, after deducting interest on the debentures and the expenses of management and other necessary deductions, yielded a net annual income of about 16,000*l.*, leaving, therefore, a deficiency of about 40,000*l.* to be made up before any dividend

could be paid to the holders of founders' shares. It further appeared that if all the existing investments were realized at their par value there would be an existing loss of over 73,000*l.*

Buckley, Q.C., and *Sargant*, for the petitioners. In writing off lost capital it is necessary to consider the rights of the members having regard to the constitution of the company. If the necessary effect of the writing off is to reduce the interest of one class of shareholders to nothing, then their shares ought to be cancelled altogether. That is the effect of the authorities concluding with the decision of Chitty J. in *In re Floating Dock Co. of St. Thomas.* (1) The loss must fall on the class which according to the constitution of the company ought to bear it.

There is nothing unfair in the scheme of reduction, and the Court will confirm the resolutions that have been passed by the shareholders.

Hastings, Q.C., and *Macnaghten*, for Mr. J. G. Barry, a holder of thirty ordinary shares. The scheme cannot be supported, inasmuch as the loss is thrown upon the founders' and ordinary shares to the indemnity of the preference shareholders, who are not entitled to any preference as to capital. According to the memorandum of association, clause 7 (F), the company had power to determine by special resolution the right of preference of any class of shares. The special resolution which is relied upon was invalid for this purpose, because it was not passed until after the preference shares had been issued, when the whole of the shareholders, including the preferred shareholders, passed the resolution giving the latter class a preference as to capital. The mere issue of the prospectus of the preference shares could give no rights to the holders except such as might be founded upon misrepresentation. In the case before Chitty J. a preference as to capital was given by the articles. The scheme is unfair and inequitable, and ought not to receive the sanction of the Court.

There was an attempt to alter the rights of shareholders as to dividend in *Ashbury* v. *Watson* (2); but the Court of Appeal held that it could not be done. The misstatement in the prospectus of the preference shares cannot give the holders any rights as

(1) [1895] 1 Ch. 691. (2) 30 Ch. D. 376.

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against the ordinary shareholders. The preference shareholders were affected with notice that no special resolution had been passed before the issue, because no such resolution was registered under s. 53 of the Companies Act, 1862.

[They also referred to *British and American Trustee and Finance Corporation* v. *Couper*. (1)]

Rowden, for Mr. Godfray, a holder of founders' shares. The Court will not in the exercise of a discretion sanction a scheme the effect of which is to extinguish one class of shares altogether, unless it can be shewn that under the constitution of the company that particular class is to be liable to loss of capital in priority to every other class, or unless it is evident that the holders of that class of shares could never get anything by way of dividend or capital: *In re Union Plate Glass Co.* (2) Art. 169 shews that the founders' shares are under no primary liability as to loss of capital; it only deals with surplus assets, and not with lost capital. If the founders' shares are cancelled and the company afterwards becomes prosperous, the other shareholders will take the whole benefit. The reduction should be so effected as to leave to every class of shareholders some kind of interest to which a right to dividend might attach.

George Lawrence, for holders of founders' shares. There is no case in which the Court has entirely extinguished founders' shares having peculiar rights such as attach to these. I adopt the argument which has already been addressed to the Court on behalf of the holders of the founders' shares.

Gilbert Purcell, for Mr. Ruffer, the holder of a founders' share.

Buckley, *Q.C.*, in reply. There is no chance of the holders of the founders' shares ever getting anything.

The Act does not lay down any rule as to how reduction is to be effected; but, according to *British and American Trustee and Finance Corporation* v. *Couper* (1), any reduction is within the Act. There are two tests to be applied. First, to see whether the reduction is consistent with the bargain between the shareholders contained in the memorandum and articles of association: *In re Union Plate Glass Co.* (2) and *In re Gatling Gun, Limited.* (3)

(1) [1894] A. C. 399. (2) 42 Ch. D. 513.
(3) 43 Ch. D. 628.

There is no inconsistency in these two cases: *Bannatyne* v. *Direct Spanish Telegraph Co.* (1) The second test is to see whether the scheme of reduction is approved by the requisite majority, and is fair in itself. It is not possible to reduce so as to give effect to the primary liability to loss of capital which rests upon the founders' shares, and at the same time to leave something to which a right to dividend might attach. It must be assumed that the special resolutions were validly passed: the Companies Act, 1862, s. 50: *Teasdale's Case* (2); *Eichbaum* v. *City of Chicago Grain Elevators, Limited.* (3)

Non-registration of a resolution under s. 53 of the Act of 1862 does not invalidate it, but only subjects the company to a penalty. The preference shareholders cannot be said to have had notice that no resolution had been passed previously to the issue of their shares. The scheme is perfectly fair, and the Court will sanction the reduction.

Cur. adv. vult.

July 23. STIRLING J. (after stating the facts). The first question is whether it is established that the alleged loss of capital has actually occurred. [His Lordship then considered the evidence upon this point, and came to the conclusion that the allegations in the petition in regard to the loss had been sufficiently proved, and he continued:—]

The next question is whether the reduction ought, as is proposed by the resolution, to be thrown primarily on the founders' shares (which are proposed to be wiped out altogether), and next on the ordinary shares. The case of the *British and American Trustee and Finance Corporation* v. *Couper* (4) shews that it is the duty of the Court to be satisfied, before confirming such resolutions as these, that there is nothing unjust or inequitable in the proposed reduction. Again, it appears from what was laid down by Cotton L.J. in *Bannatyne* v. *Direct Spanish Telegraph Co.* (1), and by Chitty J. in *In re Floating Dock Co. of St. Thomas* (5), that where there are different classes of shares

(1) 34 Ch. D. 287.
(2) L. R. 9 Ch. 54.
(3) [1891] 3 Ch. 459.
(4) [1894] A. C. 399.
(5) [1895] 1 Ch. 691.

STIRLING J. the loss on a reduction ought to fall on those who would have to bear it if there were a winding-up; and, taking this to be the rule, I have to see how it is to be applied in the present case. [His Lordship then referred to the rights of the holders of founders' shares to dividends, to the provisions of the articles of association with reference to them, and to the balance-sheet above alluded to, and he continued:—]

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I think, therefore, there is no reasonable prospect of anything ever coming to the holders of founders' shares, either in respect of dividend or of capital, and, consequently, it does not appear to me to be unfair to throw on them in the first instance the loss which has actually occurred.

The case of the ordinary shareholders raises a different and more difficult question. It is contended on their behalf that, regard being had to the circumstances under which the preference shares were issued, the preference shares do not carry with them any preference as regards distribution of capital on a winding-up. I think, that having regard to the provisions of the memorandum of association, clause 7 (B), it was competent to the directors to fix the rate of the preferential dividend so long as it did not exceed 5 per cent., because it says: "There shall first be paid out of the net profits of the company in each year to the holders of the preferred shares a cumulative preferential dividend, at a rate not exceeding 5*l.* per cent. per annum on the amount paid up thereon for the time being." But then it was not competent for them, without the sanction of a special resolution, to confer any other preferential rights. [His Lordship then further referred to the facts, and continued:—]

Now, it is contended on behalf of the opposing shareholders that these resolutions are of no validity. It is said that the memorandum of association according to its true construction requires that the special resolution defining the preference should be passed previously to the issue of the shares, and that a resolution passed subsequently to the issue of the shares cannot set the matter right, because it is passed by a body of shareholders different from that which would be called upon to sanction the preference before the issue. In the present case, for example, the holders of ordinary and founders' shares were

the persons by whom the special resolutions ought to have been passed; while the resolutions of 1893 were passed by the whole body of shareholders, including the holders of preference shares as well as ordinary and founders' shares.

Now, on this two questions seem to arise: first, was the issue of preference shares absolutely incapable of ratification by the company? and secondly, if not, has it been duly ratified? As to the first of these questions, if the issue was absolutely beyond the powers of the company as defined by the memorandum of association, no doubt it was incapable of ratification. What actually took place was this: the directors took upon themselves to issue the shares without obtaining the sanction of a special resolution of the company. Now, the company might, as it seems to me, have passed a special resolution delegating to the directors the power of determining what rights of preference should be given to the preferred shareholders. But then it is said that the special resolution ought to have been passed before the issue of the shares. The memorandum, however, does not expressly say so, and I do not think it would be right to construe the memorandum so as to prevent the company rectifying a slip such as seems to have occurred in the present case, if that can be done consistently with justice. This being so, it seems to me that it cannot be said that the acts of the directors as regards the issue were absolutely incapable of ratification.

But then arises an important question, namely, How is such a ratification to be given? It would seem to me that the ratification must proceed from the holders of the ordinary and preference shares, for it lay with them, in the first instance, to determine what rights of preference should be given. The same conclusion will be arrived at if we consider what the rights of the preferred shareholders were who applied for their shares on the faith of the prospectus which contained a statement that the shares were preferred as regards distribution of capital as well as regards interest. I leave out for the moment the consideration of any special circumstances in the present case, as to which I shall say a word in a moment; but it seems to me that the applicants for shares, on discovery that they had not got a

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preference to which the prospectus said they were to be entitled, would have a right to demand either that shares conferring such right should be given them or that the transaction should be set aside, and all payments made in expectation of the issue of such shares should be returned. Supposing this attitude were taken up by the preference shareholders, then I conceive it would be competent for the holders of ordinary and preference shares to say which alternative should be adopted; and as their decision would be given at a general meeting, it would be right to summon to such general meeting the preferred shareholders in order that their views might be expressed at the meeting; but it would seem to me that for the purpose of the decision their votes ought not to be counted. At the meetings held on April 27 and May 15, 1893, the holders of preference shares were summoned as well as the holders of ordinary and founders' shares, and were not only there, but they voted at those meetings. If the resolutions then passed had been carried by the votes of the preference shareholders, I should have thought that they could not be relied upon. But the meetings were attended by substantial numbers of holders both of ordinary and founders' shares. The resolutions were unanimous; and I cannot see any reason why these being passed by the proper majority (wholly irrespective of the presence of the preference shareholders) it should not be treated as a sufficient ratification of the acts of the directors.

Following up the second line of considerations to which I have just referred, namely, that derived from the consideration of the rights of the preference shareholders, it is urged on behalf of those who oppose the petition that in April, 1893, it was too late for the preferred shareholders to claim the rights to which they might originally have been entitled. It is said that they must be taken to have had notice that a special resolution sanctioning the issue of the preference shares had not been passed, because if it had been passed a copy of such resolution ought, in accordance with s. 53 of the Companies Act 1862, to have been found in the office of the Registrar of Joint Stock Companies. Such a view of the legal position appears to be sanctioned

by what is laid down in *Irvine* v. *Union Bank of Australia* (1), and it is further pointed out that some of the shares were surrendered, and it is suggested that the surrender was made in consequence of the discovery of the defect in the original issue. Again, it is said that the preference shareholders accepted dividends in the interval between the issue of the shares and April 27, 1893. Notwithstanding these circumstances, I am not persuaded that the rights of the preference shareholders were affected thereby. Such notice as they had of the absence of a special resolution was constructive only; and, if in point of fact the preference shareholders were ignorant of the omission, and such ignorance is attributable, as it seems to be in the present case, to the frame of the prospectus issued by the company, I do not think that mere constructive notice would prejudice their rights against the company whatever might be the effect of such notice as against third parties. There is no evidence to shew that the defect had become known to the preference shareholders before April, 1893. It is a mere suggestion. The solitary holder of ordinary shares who opposes the petition has not pledged his own belief that this is the fact, or cross-examined the witnesses who have made affidavits in support of the petition. However this may be, I think it lay with the holders of founders' and ordinary shares to determine whether the acts of the directors should be ratified or not. The prospectus on which the ordinary shares were issued warned the holders of those shares that shares to be preferred both as to capital and dividend were afterwards to be issued. The prospectus of the preferred shares plainly states that those shares were to have a preference as to capital. Under these circumstances it may well have been that the holders of ordinary and founders' shares considered in April and May, 1893, that it was not otherwise than in accordance with honesty and justice that the right of preference as regards capital should be sanctioned by them, if this could lawfully be done. In my opinion, such sanction was within their legal powers and has been effectually given.

I come to the conclusion, therefore, that there is nothing in

(1) 2 App. Cas. 366, 379.

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the proposed reduction which is unjust or inequitable, or requires the Court to abstain from confirming it.

I therefore make an order in accordance with the prayer of the petition.

Solicitors: *Paines, Blyth & Huxtable; Cowdell & Son; H. C. Godfray; Slaughter & May; W. A. Crump & Son.*

G. A. S.

STIRLING J. 1895 *June* 13; *July* 24.

RUTTER *v.* EVERETT.

[1893 R. 923.]

Bankruptcy—Order and Disposition—Book Debts—Mortgagees of—Notice of Assignment—Receiver—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 44 (*iii.*), *s.* 49 (*d.*)—*Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 19, *sub-s.* I., *cl. iii.*, *s.* 24.

In order to take book debts out of the order and disposition of an assignor the assignee must give notice to the debtors, and take every possible step to obtain possession of the debts.

A mortgagee of book debts who, without notice of any act of bankruptcy by the mortgagor, gives the debtors notice of his assignment is entitled to the protection conferred by the Bankruptcy Act, 1883, s. 49.

Although, from the absence of notice, consent on the part of the true owner to a debt remaining in the order and disposition of a bankrupt is primâ facie to be inferred, the inference will be rebutted if the true owner takes every possible step to obtain possession of the debt, or if his failure to obtain possession is not attributable to his own fault.

In 1891 a trader assigned, inter alia, his business premises and book debts by way of mortgage. On May 9, 1893, the mortgagees, under the powers of the Conveyancing Act, 1881, appointed A. B. receiver of the income of the mortgaged property, and he entered into possession of the premises and carried on the business. On May 16 the trader committed an act of bankruptcy, and on May 17 the mortgagees, without notice of this act, commenced an action in which A. B. was on May 19 appointed receiver of the book debts by the Court. Neither the mortgagees nor A. B. ever gave notice of the assignment to the debtors; and A. B. received certain moneys paid in respect of the book debts. On June 16 a receiving order was made against the trader, and he was subsequently adjudicated bankrupt:—

Held, (1.) that neither the appointment of a receiver by the mortgagees nor that by the Court was sufficient to take the book debts out of the order and disposition of the bankrupt with the consent of the true owners, unless followed by notice to the debtors within a reasonable

time; and *held*, (2.) that as by the default of the mortgagees no such notice was given, the trustee in bankruptcy was entitled to the book debts and the moneys received in respect thereof.

ADJOURNED SUMMONS.

By a deed dated December 31, 1891, the defendant, Henry William Everett (who then carried on, under the style of Wolff, Phillips & Co., the business of a tobacconist at No. 289, Oxford Street, and elsewhere), demised the leasehold premises, No. 289, Oxford Street, to the plaintiffs for the residue of a term of twelve and a half years, less ten days, by way of mortgage to secure the repayment of 1000*l.* with interest; and also assigned by way of further security certain trade-marks, the goodwill and connection of his business of a tobacconist, and also "all moneys to be received by or owing to" the mortgagor in respect of his business of a tobacconist. The 1000*l.* was to be repaid by monthly instalments, and it was provided that, if the mortgagor should make default in payment of an instalment for fourteen days, the whole of the money due on the mortgage should become payable forthwith. The deed contained no express power of appointing a receiver.

In November, 1892, the mortgagor made default in payment of an instalment within the terms of the deed.

On May 9, 1893, the plaintiffs executed a written instrument in the following terms: "We . . . by virtue of the power conferred on us under the Conveyancing and Law of Property Act, 1881 (as mortgagees of the undermentioned property), and of every other power enabling us in this behalf, hereby appoint Charles Ford . . . to be receiver of the income of the premises known as 289, Oxford Street, in the county of Middlesex, and of the trade-marks . . . and the goodwill and connection of the business carried on by Henry William Everett at 289, Oxford Street aforesaid, under the style of Wolff, Phillips & Co., with all the powers by the said Act conferred on a receiver appointed under the provisions thereof, at the remuneration of 5 per cent. on the gross amount of all moneys received by him." Ford thereupon took possession of No. 289, Oxford Street; and thenceforward carried on the business of a tobacconist thereon. It was a matter in dispute between the parties whether he did or

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did not take possession of the stock in trade on the mortgaged premises.

On May 16, 1893, Everett committed an act of bankruptcy.

On May 17, 1893, the present action was commenced by an originating summons, in which the plaintiffs claimed relief by way of foreclosure and the appointment of a receiver. It was alleged that at the time the writ in this action was issued the plaintiffs had notice of the act of bankruptcy committed; but in the view which the learned judge took of the evidence this was not established.

On May 18, the defendant, Everett, excluded Ford from possession of No. 289, Oxford Street, and kept the shop closed during the day for the purpose, as Everett alleged, of preventing Ford from selling the stock in trade.

On May 19, an order was made in the action whereby, without prejudice to the power already possessed by him as receiver under the Conveyancing and Law of Property Act, 1881, Ford was appointed receiver of the leasehold premises, No. 289, Oxford Street, of the trade-marks, and of all moneys to be received or owing to the defendant in respect of the business of a tobacconist carried on by the defendant on the said premises under the style of Wolff, Phillips & Co., and to manage the business.

On June 16, a receiving order was made against the defendant Everett, founded on the act of bankruptcy committed by him on May 16. The defendant was subsequently adjudicated bankrupt, and on October 24, 1893, the trustee in the bankruptcy was made a defendant to the action.

Neither the plaintiffs nor the receiver ever gave the debtors of the bankrupt any notice of the assignment of December 31, 1891. The receiver carried on the business, and in course of the management received book debts due to the bankrupt at the commencement of the bankruptcy to the amount of over 400*l.* Upon the receiver's accounts being taken in chambers, the trustee in the bankruptcy claimed such amount as representing book debts in the order and disposition of the bankrupt with the consent of the true owners at the commencement of the bankruptcy; and the question of the validity of such claim was adjourned into court, and came on for argument on June 13, 1895.

Eve, for the trustee in bankruptcy of the defendant, Everett. The plaintiffs claim the sum representing these book debts as mortgagees; but they never completed their title to the book debts by giving the debtors notice of the assignment contained in the mortgage, and the title of the trustee in bankruptcy, which relates back to May 16, accrued before they had ever taken possession. The book debts must, therefore, be treated as goods being, at the commencement of the bankruptcy, in the order and disposition of the bankrupt as reputed owner, with the consent of the plaintiffs as the true owners, within s. 44 of the Bankruptcy Act, 1883. The title of the trustee in bankruptcy is accordingly paramount to that of the mortgagees: *Tailby* v. *Official Receiver* (1); *Ryall* v. *Rowles* (2); *Edwards* v. *Martin* (3); Williams on Bankruptcy, 6th ed. p. 204.

The appointment of Ford as receiver on May 9, 1893, was inoperative as to these book debts, which it does not even purport to include. The power of appointing a receiver conferred by the Conveyancing Act, 1881, s. 19, sub-s. I., cl. iii., and s. 24, only enables mortgagees to appoint receivers of the income of mortgaged property; and these book debts are part of the corpus of the mortgaged property. Ford's subsequent appointment by the Court was not made until after the plaintiffs had notice of Everett's bankruptcy.

Cooper Willis, Q.C., and *Butcher*, for the plaintiffs, the mortgagees. It is contended that these book debts were goods in the order and disposition of the bankrupt with our consent; but consent cannot be implied: *Taylor* v. *Eckersley*. (4) On the other hand, the instrument of May 9 shewed the determination of our consent as to the whole of the mortgaged property, and from that date, though we did not give notice, our receiver was in possession of the premises, except on May 18, when he was excluded. On May 17, before we had notice of any act of bankruptcy by Everett, we commenced this action by writ asking for the appointment of a receiver; that, at all events, was a determination of our consent. And on May 19, Ford was appointed by the Court receiver of all moneys owing to the defendant.

(1) 13 App. Cas. 523.
(2) 1 Ves. Sen. 348.
(3) L. R. 1 Eq. 121.
(4) 5 Ch. D. 740.

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This appointment operated as an injunction to restrain the defendant from receiving any book debts; and took them out of his order and disposition, even if they were so with our consent at the time. It is said that neither the plaintiffs nor the receiver ever gave the debtors notice of the assignment of the book debts; but under the circumstances notice was not necessary. An injunction restraining the creditor from receiving is stronger than a notice to the debtor not to pay: *Brewin* v. *Short* (1); *Ex parte Ward* (2); *Ex parte Kelsall.* (3)

Eve, in reply. I concede that if between the act of bankruptcy and the making of the receiving order the plaintiffs had without notice of that act taken the proper steps to obtain possession by giving notice to the debtors, their title would have been good. But they did not do this, so that the cases cited, in which possession was obtained, do not apply. The title of the trustee in bankruptcy relates back to May 16, when the act of bankruptcy was committed; so that in effect there was on that day an assignment to him of all the bankrupt's choses in action (the Bankruptcy Act, 1883, ss. 44, 50, and 54), and there was no withdrawal of consent before that day. The case of *Wigram* v. *Buckley* (4) shews that in such a case as this the appointment of a receiver does not complete a mortgagee's title unless notice is given to the person from whom the book debt is due. [He also referred to Williams on Bankruptcy, 6th ed. p. 162.]

Cur. adv. vult.

July 24. STIRLING J., after stating the facts of the case to the effect above set forth, continued:—It was alleged that the plaintiffs had on May 16 or 17 notice of the act of bankruptcy committed by Everett; such notice, however, has not, in my opinion, been established by the evidence.

On behalf of the plaintiffs it was not disputed that the debts were at the commencement of the bankruptcy in the order and disposition of the bankrupt; but it was contended that they were not in such order or disposition with the consent of the true owners, the plaintiffs; or that, at all events, they were not in

(1) 5 E. & B. 227.
(2) L. R. 8 Ch. 144.
(3) De G. 352.
(4) [1894] 3 Ch. 483, 491, 494.

such order or disposition with such consent on or after May 17, at which date, as I have found, the plaintiffs had no notice of any act of bankruptcy on the part of Everett.

In support of the contention that the debts were not in the order and disposition of the bankrupt with their consent, the plaintiffs rely, in the first place, on the instrument of May 9, 1893. It is objected by the trustee in bankruptcy that this instrument does not in terms include the book debts; and, further, that the Conveyancing Act, 1881 (see ss. 19 and 24), only enables a mortgagee to appoint a receiver of the "income of the mortgaged property," and that the book debts are not such income, but constitute the mortgaged property itself. There is certainly weight in these objections; but they do not appear to conclude the case in favour of the trustee in bankruptcy. It may be that the acts of the receiver, although not authorized by the instrument in question, yet being ratified by the plaintiffs, amount to or are evidence of a determination of their consent to the receipt of the debts by the bankrupt; and I pass on to consider how the law on this point stands.

As a general rule, the assignee of a debt, in order to take it out of the order and disposition of the assignor, is bound to give notice of the assignment to the debtor. This is laid down in *Bartlett* v. *Bartlett*. (1) There the subject-matter of the assignment was a reversionary interest in a fund in Court, and prior to that decision there had been some conflict of opinion as to whether it was necessary in such a case to give notice. Turner L.J. in that case was dealing with an earlier Bankruptcy Act; but his observations appear to me to be equally applicable to that which is now in force. In the course of his judgment he expressed himself as follows: "Looking at the question upon principle, what is the object of the enactment? Clearly to prevent credit being obtained by an apparent ownership, assumed with the consent and permission of the true owner. To confine the enactment to cases in which there is a visible ownership would be to subvert decisions without end upon the subject, nor would it be consistent with the object of the enactment, for credit may be got as readily upon property in which there is not, as upon property

(1) 1 De G. & J. 127, 140.

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in which there is, a visible ownership. Considering then the enactment to extend to personal chattels in which there is no visible ownership, when (to adopt the language of the statute) is a bankrupt to be said with the consent and permission of the true owner to have had in his possession, order or disposition goods and chattels of this description whereof he was the reputed owner or whereof he has taken upon himself the sole alteration or disposition as owner? How is the true owner to prevent the reputed ownership? How can it be prevented otherwise than by notice to the person who is under liability in respect of the chattels? The law has said this is the mode of preventing reputed ownership as to debts; and is there to be one law as to debts and another as to legacies? The plain object of the statute is, that the true owner shall not permit the order and disposition to remain with the bankrupt; and if he does not take the steps which are necessary to prevent it, surely he must be taken to permit it."

It is not, however, to be inferred that it is absolutely necessary, as regards goods, that they should be in the actual possession of the true owner at the commencement of the bankruptcy, or, as regards chattels "in which there is no visible ownership," that notice should be given before that time. In *Smith* v. *Topping* (1) the true owner of goods permitted them to remain in the possession of the bankrupt until the day before the commencement of the bankruptcy, and then demanded them to be given up, but was met by a refusal: and it was held that, at the commencement of the bankruptcy, the goods were not in the possession of the bankrupt with the consent of the true owner. This decision was acted upon by the Court of Appeal in *Ex parte Ward* (2), where the goods, of which possession had been demanded from the bankrupt, were not actually in his hands, but were in those of a warehouseman, to whom no notice was given. In that case an innkeeper named Ward, in December, 1870, bought from Couston & Co. several hogsheads of whisky in bond, which it was agreed should remain in bond to Couston & Co.'s order, rent free, for twelve months, after which warehouse rent was to be paid. In March, 1871, Ward paid for the whisky. In November,

(1) 5 B. & Ad. 674. (2) L. R. 8 Ch. 144.

1871, Ward died, and on February 19, 1872, his executors wrote to Couston & Co., directing them to forward a specified hogshead, inclosing a cheque of sufficient amount to pay duty and warehouse rent, and to clear the whisky. On February 26, Couston & Co. filed a petition for liquidation, having retained the cheque, but not having complied with the directions. At the time of the sale the whisky was carried to Ward's credit in Couston & Co.'s books, but at the time of filing the petition it was still lying in the Leith Dock warehouse, to the order of Couston & Co. In that case Mellish L.J., in the course of his judgment, said (1): "The question then is, was it" (i.e. the whisky) "at the time of the bankruptcy within the order and disposition of the bankrupts with the consent of the true owner? It is clear law, as laid down in *Smith* v. *Topping* (2) and other cases, that if the true owner bonâ fide demands possession with a view of taking possession before the bankruptcy, though from no fault of his own he fails to get it, the goods are not within the possession of the bankrupt with his consent. This case is within that rule. There was a demand of possession, and nothing to shew that it was not a bonâ fide demand. The only difference between this and the ordinary case is, that here the property was not in the actual possession of the bankrupts, but of another warehouseman, and the Chief Judge appears to have gone upon this. But it appears to me to make no difference, for though, in order to take the goods out of the possession of the bankrupts, notice must have been given to the warehouseman, still, for the purpose of determining the consent of the true owner, the bankrupts were the proper persons to receive the notice. The purchaser cannot be in any worse position because the bankrupts did not keep the goods in their own warehouse."

Again, in *Belcher* v. *Bellamy* (3), the assignee of a debt due to a person in this country from a debtor in Australia, posted a letter containing notice of the assignment before his assignor became bankrupt, though it did not reach the debtor until after the bankruptcy; and it was held that the debt did not remain in the order and disposition of the bankrupt with the consent of

(1) L. R. 8 Ch. 148. (2) 5 B. & Ad. 674.
(3) 2 Ex. 303.

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the true owner. There Pollock C.B., in his judgment, says (1): "The modern rule is, that goods are not deemed to be in the possession of a trader, with the consent of the true owner, if the latter takes every possible pains to obtain possession of them. The question then is, whether the true owner in this case consented to the goods remaining in the possession of the bankrupt. He certainly did not; for, immediately he became owner, he took every possible step to give effect to the assignment—namely, by sending notice to the debtor; but before the notice arrived, the assignor of the debt became bankrupt. It is argued, that, because the plaintiff took an assignment of the debt, he consented to its remaining with the bankrupt. I cannot agree to that. The assignee took the debt with a right to claim it instanter, and he does so, as far as time and space will permit." In the same case Parke B. says (2): "The real owner was the defendant, to whom the debt was assigned. The assignment bound the assignor in equity; and when the defendant had taken all proper steps to obtain possession of the debt, he became entitled to it, both at law and in equity; and the bankrupt's assignees could not claim it, unless the defendant had unconscientiously permitted it to remain in the possession of the bankrupt. It appears, however, that he could not prevent it, and that everything was done that could be done, so that it is impossible to say the real owner consented to the bankrupt retaining possession. In *Load* v. *Green* (3), trover was brought for goods obtained by a party, afterwards bankrupt, with the fraudulent intention of never paying for them, and that was held sufficient to prevent the operation of the statute. According to Mr. Bramwell's argument, in all cases where there is a purchase of goods, under such circumstances that the vendee cannot possibly have immediate possession, he consents to their remaining in the possession of the vendor. If that argument were correct, the effect would be to prevent any assignment of goods abroad, and all commerce with respect to such goods must be at an end. The case suggested, of an assignee of a debt binding himself not to give notice to the debtor within a certain period, might be a

(1) 2 Ex. 308. (2) 2 Ex. 310.
(3) 15 M. & W. 216.

case of possession by the debtor with the consent of the true owner, because during the stipulated time he absolutely precludes himself from taking any step to prevent the debt from remaining in the order and disposition of the bankrupt." And Rolfe B. also says (1): "A person, purchasing a chose in action, is considered to leave it in the possession of the debtor, unless he is active and gives notice; although, if he takes every possible step to give notice, and the debt nevertheless remains in the possession of the bankrupt, it does not so remain with the consent and permission of the purchaser."

The conclusion from these authorities appears to be that, although from absence of notice consent on the part of the true owner to the debt remaining in the order and disposition of the bankrupt, is primâ facie to be inferred; still that inference may be rebutted by other facts, and will be rebutted if, in the language of the judges of the Court of Exchequer, the true owner takes every possible step to obtain possession of the debt; or if, in the language of Mellish L.J., the failure to obtain possession is not attributable to any fault of his own. I may add that the cases of *Re Styan* (2), *Young* v. *Hope* (3), and *Brewin* v. *Short* (4) appear to me to establish that if the proper steps are taken while the assignee has no notice of any act of bankruptcy, the assignee will be entitled to the benefit of the protection conferred by s. 49 of the Bankruptcy Act, 1883.

This being my view of the state of the law, I have next to apply it in the present case. If the bankruptcy had occurred within a short time after May 9 or 16, 1893, I should have thought that the doctrines laid down in *Smith* v. *Topping* (5), *Ex parte Ward* (6), and *Belcher* v. *Bellamy* (7), applied. In point of fact, however, the receiving order in bankruptcy was not made until June 16, 1893, a month later than the receivership order. In the interval there was ample time to give the usual notice to the debtors of the bankrupt.

The question arises why was not this notice given? Now,

(1) 2 Ex. 311.
(2) 2 M. D. & D. 219.
(3) 2 Ex. 105.
(4) 5 E. & B. 227.
(5) 5 B. & Ad. 674.
(6) L. R. 8 Ch. 144.
(7) 2 Ex. 303.

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the bankrupt, in his affidavit, says this: "No notice was given to the said debtors to my business of any assignment of the said debts to the plaintiffs prior to the said act of bankruptcy committed by me on or about May 16; nor was any such notice given within one month after the date of such act of bankruptcy. I understood from the receiver's conversation that such notice was not given, because the same would injure the business."

That was a challenge to the receiver; but in his affidavit in reply he simply says this (Paragraph 6): "No formal notice of the assignment of the said book debts was given to the debtors, but I am advised and believe that my appointment on May 9, and my subsequent appointment by the Court on May 19, took the said book debts out of the order and disposition of the said Everett, and that as such receiver I am entitled to receive and am justified in retaining the said book debts."

In my judgment the receiver's view of the law was not well founded. I think that neither the appointment on the 9th of May nor the subsequent appointment by the Court was sufficient to take the debts out of the order and disposition of the bankrupt with the consent and permission of the true owner, unless followed within a reasonable time by the appropriate step for obtaining possession of the debts by giving notice to the debtor. This was not done, and the failure appears to me to be attributable to a default on the part of the plaintiffs. I think therefore the trustee in bankruptcy is entitled to these debts.

Solicitors: *Morten, Cutler & Co.; West, King, Adams & Co.*

W. W. K.

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1895
Oct. 26, 31.

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[1895 A. 791.]

Will—Construction—Heirlooms—Trust for Person entitled to "actual" possession of Realty.

Chattels bequeathed as heirlooms upon trust to go along with, and be enjoyed by the person for the time being entitled under a settlement to the "actual" possession of, settled real estate do not vest absolutely in a tenant in tail of the real estate who dies in the lifetime of the tenant for life.

Lord Scarsdale v. *Curzon* (1 J. & H. 40) considered and applied.

ADJOURNED SUMMONS.

John Julius Angerstein, by his will dated January 16, 1823, gave and devised certain freehold estates in the counties of Norfolk, Suffolk, Lincolnshire, and Kent to his son John for life, with remainder to the issue of his son in such manner and for such estates as his son should appoint, with remainders over in strict settlement; and the testator also bequeathed certain chattels and articles at his mansion-house as heirlooms unto his trustees, their executors, administrators, and assigns, upon trust to permit and suffer his son John to use and enjoy the same during his natural life. And the will then proceeded as follows: "and from and after the decease of my said son upon trust to permit and suffer the same to go along with, and to be used and enjoyed by the person or persons who shall for the time being, by virtue of the limitations hereinbefore contained, be entitled to the actual possession of, my said freehold estates in the county of Norfolk, as or in the nature of heirlooms to the same estates so far as the rules of law and equity will permit."

The testator, John Julius Angerstein, died on January 29, 1823; and in 1852 John Angerstein, in exercise of the power given to him by his father's will, executed three settlements, dated respectively the 5th, 6th, and 7th of August in that year,

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of the freehold estates devised by the will, which estates became, under these settlements, vested in William Angerstein for life, with remainder to W. J. Nettleship Angerstein, his eldest son in tail.

John Angerstein, who died in 1854, by his will bequeathed certain chattels and articles as heirlooms to be held and enjoyed by the person or persons who, under the indenture of August 5, 1852, and his will should for the time being be entitled in possession to his freehold mansion-house, but so, nevertheless, that the same or any part or parts thereof should not, for the purpose of transmission, vest absolutely in any tenant in tail, or in tail by purchase of the mansion-house, who should not attain the age of twenty-one years.

On the death of John Angerstein, William Angerstein became tenant for life in possession of all the real estates with remainder to W. J. Nettleship Angerstein in tail.

W. J. Nettleship Angerstein attained the age of twenty-one on September 19, 1864; and in 1866 he barred the entail with his father's concurrence, and shortly afterwards resettled the estates. Under the resettlement the life estate of W. Angerstein was restored, and W. J. Nettleship Angerstein became the next tenant for life, with remainder to his first and other sons successively in tail male.

In 1874 W. J. Nettleship Angerstein became a liquidating debtor, and the trustee under his liquidation sold all the assets to William Angerstein.

W. J. Nettleship Angerstein died on February 17, 1892, and Julius Henry W. Angerstein, his only son, attained the age of twenty-one in December, 1893, and was the present tenant in tail of all the freehold estates, subject to the life interest of his grandfather, William Angerstein.

This was an originating summons by William Angerstein, as plaintiff, against J. H. W. Angerstein and the trustees of the two wills, as defendants, for a declaration that the plaintiff was absolutely entitled to the chattels.

Vaughan Hawkins, for the plaintiff. The effect of the clauses in these two wills was to vest the absolute property in the

chattels bequeathed as heirlooms in W. J. Nettleship Angerstein, as being entitled to a vested estate tail in the real estate, according to the principle of *Foley* v. *Burnell* (1) and *Martelli* v. *Holloway*. (2) The only difficulty in applying the principle arises from the use of the words "actual possession" in the earlier will, and the decision of Wood V.-C. in *Lord Scarsdale* v. *Curzon* (3), which is said to shew that the word "actual" must be taken to refer to actual physical possession, so that a tenant in tail dying before coming into such possession is excluded. But *Lord Scarsdale* v. *Curzon* (3) was a very special case: the words of gift in that case were different from those in the present case, and Wood V.-C. relied on the word "actual" as only one of several indications of the intention of the testator. In principle there can be no difference between a person "entitled to possession" and a person "entitled to actual possession." This tenant in tail had a title in futuro to the actual possession.

R. Younger, for J. H. W. Angerstein, the existing tenant in tail. The plaintiff is only entitled to a life interest in the chattels, and W. J. Nettleship Angerstein, having predeceased the tenant for life, and thus never come into possession, is excluded.

[KEKEWICH J. observed that the principle of *Foley* v. *Burnell* (1) clearly applied to the gift of chattels contained in the later of the two wills.]

Lord Scarsdale v. *Curzon* (3) shews that the question is one of intention to be gathered from the words of the particular will. But, at all events, as regards chattels passing under the earlier will, that case is a clear authority establishing that "where there are clear words referring to actual possession a tenant in tail who dies before coming into possession is excluded": Theobald on Wills, 4th ed. p. 593. When *Foley* v. *Burnell* (1) was decided it was regarded as doubtful whether a testator could impose a condition of possession such as that in question; but all difficulty on that ground is removed by *Lord Scarsdale* v. *Curzon*. (3)

F. E. Farrer, and *Reginald Hughes*, for the trustees of the two wills.

(1) 1 Bro. C. C. 274; 4 Bro. P. C. 319.
(2) L. R. 6 Eq. 523; 5 H. L. 532.
(3) 1 J. & H. 40.

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Vaughan Hawkins, in reply. The peculiarity of this case is that there has been an absolute disentail; and therefore, assuming that "actual possession" means "physical possession" and is restrictive, yet when on the disentail the estate ceased to be subject to the limitations the restriction was exhausted. It could not have been intended that the chattels should be tied up for a longer period than the real estate. If the limitation had been expressed in conveyancing language there would have been a direction that the chattels should not vest in any tenant in tail by purchase who should not come into the physical possession of the estate, unless the limitations should be effectually barred. In *Foley* v. *Burnell* (1) and *Lord Scarsdale* v. *Curzon* (2) there were persons who might become entitled in the future by force of the restrictive words; but here the complete disentail has relieved the case of that difficulty.

KEKEWICH J. The question which I have to decide is whether the plaintiff is entitled to certain heirlooms settled by two wills. He claims through a person who was undoubtedly tenant in tail in remainder of the hereditaments to which the heirlooms were annexed; and it is unnecessary to go through the devolutions of title, because it is conceded that if that tenant in tail was entitled to the heirlooms, so as to be capable of making a transfer of them, the applicant is now entitled through him.

I will deal first with the second of the two wills, that of John Angerstein. The clause in that will settling the heirlooms is in a form which is familiar to conveyancers, and seems to come distinctly within the rule of law which is recognised in all the cases, including *Lord Scarsdale* v. *Curzon* (2), and which is accurately stated in Theobald on Wills, 4th ed. p. 592, as follows: "A gift of personalty as heirlooms to the persons for the time being entitled to real estate, so far as the rules of law and equity permit, vests absolutely not in a tenant for life of the real estate, but in the first tenant in tail at birth, whether he comes into possession or not." The clause in the second will comes so clearly within that rule that Mr. Younger, when confronted with it, very properly declined to argue that part of

(1) 1 Bro. C. C. 274; 4 Bro. P. C. 319. (2) 1 J. & H. 40.

the case any further. I hold, therefore, that the plaintiff is absolutely entitled to the chattels settled by the second will.

The words of the earlier will, that of John Julius Angerstein, present more difficulty. [His Lordship read the words of the clause relating to the heirlooms, as above set out, and continued:—] The form is somewhat different from that found in the other will, but in substance the only real difference is that the word "actual" is attached to possession. I cannot accede to the argument of Mr. Vaughan Hawkins in reply, based upon the suggestion that conveyancers, treating these words as instructions for a settlement, would write them out in full in some particular way. That seems to me to be entirely beside the question which I have to decide. I have to say what is the meaning and proper legal effect of the words before me, and not to consider how any person, regarding them as instructions, might elaborate them so as to give effect to the presumed intention of the testator. Here the testator has said that the heirlooms are to go to the persons for the time being entitled to the "actual" possession of the testator's freehold estates in the county of Norfolk. Does the introduction of the word "actual" make any difference? If that word were omitted, then I think the principle of *Foley* v. *Burnell* (1) and other cases would apply, and the first tenant in tail would take. Everything, therefore, depends on the question whether the word "actual" adds anything in substance to the clause. In *Lord Scarsdale* v. *Curzon* (2) there is an interesting judgment of Wood V.-C., in which the practice of conveyancers, their precedents and forms, and the cases bearing on this question, are fully discussed and considered. I have read that judgment with attention, and the result is to lead me to the conclusion that the introduction of the word "actual" does make a very large and important difference. I think that is really decided in *Lord Scarsdale* v. *Curzon*. (2) The gift there was to the persons seised of or entitled to the "actual freehold," and not to the persons entitled to the "actual possession." Upon the construction of those words the Vice-Chancellor, after consideration, came to the conclusion that the "code of law" which he stated was not applicable to the particular

(1) 1 Bro. C. C. 274; 4 Bro. P. C. 319. (2) 1 J. & H. 40.

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heirlooms governed by those words. Is there any difference in substance between the phrases "entitled to the actual possession" and "entitled to the actual freehold"? To my mind, they really mean the same thing; and it would seem that the reporter of *Lord Scarsdale* v. *Curzon* (1) was of that opinion, for I observe that it is stated (2) that "the deed contained various clauses, in which the words 'actual freehold' were so used that they could only be construed as signifying 'freehold in possession.'" The argument went on that footing, and the Vice-Chancellor came to that conclusion. After referring to a precedent in Davidson on Conveyancing the Vice-Chancellor says (3): "Heirlooms are given to be enjoyed, so far as the rules of law and equity will permit, by the person who shall be in the actual possession or in the receipt of the rents and profits, but so as not to vest absolutely in any person thereby made tenant in tail by purchase, unless such person shall attain the age of twenty-one years; but on the death of such tenant in tail by purchase, the same shall go in the same manner as if they had been freeholds of inheritance, and had been thereby devised and settled accordingly." He adds: "That is framed in order to tie up the chattels to the person in possession"; so that he had present to his mind and put a construction upon the very words which I have before me here. Then the Vice-Chancellor says (4): "In order to determine the construction of these clauses, I must first settle the meaning of the phrase 'the person seised of or entitled to the actual freehold.' In my opinion, this can have no other meaning than the person in possession"; and later on he says: "I think it impossible to give to the words 'the person seised of or entitled to the actual freehold' any other meaning than the person in possession. I am far from saying that the words 'actual freehold' have any such technical sense; nor do I rest my opinion on the phraseology pointed out in some passages of Coke upon Littleton; but, on the whole of this settlement, I have no doubt about the meaning of these words." And again, on the top of p. 67, he says: "'Actual,' therefore, must mean in possession, or the clause would have no meaning."

(1) 1 J. & H. 40.
(2) Ibid. 43.
(3) 1 J. & H. 65.
(4) Ibid. 66.

I dwell upon that because it seems to me that, whatever my impression might be as to the grammatical meaning of the words used or my view derived from knowledge of what testators generally desire, I am bound not to construe the words of the second will in any manner contradictory to the rule of law laid down in the cases. It is most important that titles should not be shaken by any decision of the Court; and it would be wrong for me to construe the words by themselves and without reference to the rule. Whatever my opinion might be as to the meaning of the words "actual possession," I should not give judicial utterance to that opinion if I found that any judge, and especially a judge of such eminence as Wood V.-C., so long ago as 1869 had put a construction on the words at variance with it. But I have this authority, that "actual freehold" and "actual possession" have the same meaning, and that the expression "actual possession" takes the heirlooms out of the general rule. In order to see whether that was not the point argued as well as the point decided in *Lord Scarsdale* v. *Curzon* (1), I have looked at the report (2), where there is the following summary of the argument, which was probably that of Mr. Rolt: "If, therefore, it is competent to limit chattels, so that the absolute interest shall go to the first person who shall become entitled to settled estates (within the limits allowed by the rule against perpetuities) in possession in inheritance, so as to exclude intervening remaindermen, this deed does so. It is competent to do so." Those were the two points to which the Vice-Chancellor directed his discussion of the authorities and precedents. He goes through the history of the law affecting these limitations, and comes to the conclusion that there was nothing in law to prevent the thing being done, that it was competent to do it, and that it was in fact done. That it is possible in law to do it is not denied here. That it has, in fact, been done seems to me to follow from the decision of the Vice-Chancellor quite as much as from the grammatical meaning of the words. In Mr. Theobald's book on wills (at p. 593) the rule enunciated in *Lord Scarsdale* v. *Curzon* (1) is laid down in these words: "If the gift of the chattels is to the person actually seised at the death of tenants

(1) 1 J. & H. 40. (2) 1 J. & H. 45.

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for life, or to the person seised of the actual freehold which is defined as freehold in possession, or there are other clear words referring to actual possession, a tenant in tail who dies before coming into possession is excluded." I think that is an accurate statement; and the result is that a tenant in tail, under such a clause as that contained in the first of these two wills, who does not come into actual possession of the devised hereditaments, has no right to transfer the heirlooms annexed to the hereditaments. I must hold, therefore, that the plaintiff is not absolutely entitled to the heirlooms passing under the will of John Julius Angerstein.

Solicitors: *Farrer & Co.; Warren, Murton & Miller; Stuart & Tull.*

C. C. M. D.

VAUGHAN WILLIAMS J.

1895

Nov. 13.

In re ANGLO-AUSTRIAN PRINTING AND PUBLISHING UNION.

[0120 of 1891.]

BRABOURNE *v.* SAME.

[1891 B. 957.]

Company—Winding-up—Debentures—Costs of Petitioner—Companies (Winding-up) Act, 1890 (53 & 54 *Vict. c.* 63), *s.* 10.

Moneys recovered in a winding-up (*a*) in proceedings under s. 10 of the Companies (Winding-up) Act, 1890, and (*b*) by calls on contributories, belong to the holders of debentures charging all the undertaking and property of the company, present and future, including its uncalled capital for the time being, and are not, where the total assets are not sufficient to pay the debenture-holders in full, subject to costs directed by the winding-up order to be paid out of the assets of the company.

But, *semble*, that the costs incurred by the liquidator in proceedings under s. 10 must be paid out of the money recovered in those proceedings.

On May 2, 1891, an order was made by Stirling J. that the Anglo-Austrian Printing and Publishing Union, Limited, should be wound up by the Court, that Mr. C. J. Stewart, the official receiver, should be constituted provisional liquidator, and that the costs of the petitioner, of the company, and of other persons named in the order, should be taxed and paid out of the assets of the company.

Mr. Stewart was afterwards appointed the liquidator of the company.

On February 24, 1891, and March 19, 1891, two actions, [1891 B. 957] and [1891 D. 530], were commenced by debenture-holders against the company to realize debentures issued by the company, and charging its undertaking and property whatsoever and wheresoever, both present and future, including its uncalled capital for the time being.

By an order made in both actions on May 4, 1891, Mr. Stewart was appointed receiver of all the property and assets of the company charged by the debentures.

By an order made in the winding-up on June 28, 1892, liberty

VAUGHAN WILLIAMS J.

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was given to the official receiver and liquidator to institute and prosecute proceedings under s. 10 of the Companies (Winding-up) Act, 1890, against certain officers of the company, and that he should be indemnified against any costs incurred by him in these proceedings out of the assets of the company.

The official receiver and liquidator recovered or obtained by compromise, in the misfeasance proceedings and under a scheme of arrangement in the bankruptcy of one of the company's officers, 7000*l.*, and he (as official receiver and liquidator in the winding-up) obtained, by calls made on contributories, nearly 1800*l.*, which sums were represented by Consols, money on deposit, and cash in court to the credit of the two actions.

The assets of the company including these funds were not sufficient to satisfy the claims of the debenture-holders in full.

The solicitor who acted for the petitioner, and for some of the debenture-holders and shareholders in whose favour costs were awarded by the winding-up order, by a deed dated November 26, 1891, mortgaged the costs due to him under the order to Thomas Mason.

The official receiver and liquidator submitted to the Court in the winding-up and the two actions the question whether the costs ought to be paid out of the assets in court to the credit of the actions. It was not disputed that the official receiver and liquidator was entitled to deduct the costs incurred by him in the misfeasance proceedings.

Martelli, for the official receiver and liquidator, stated the facts to the Court.

M. Muir Mackenzie, for the mortgagee of the petitioning creditor's costs. The winding-up order was made before any order was obtained in the actions, and the result of the proceedings under s. 10 of the Act of 1890, which could only be taken in a winding-up, has been the recovery of moneys which go to increase the fund available for the debenture-holders. They ought to take the amount recovered subject to the costs incurred in commencing winding-up proceedings, which were essential to the salvage of the fund.

[VAUGHAN WILLIAMS J. My difficulty is that, when the

costs of the petition were incurred, the Court could not make any order charging them on the assets in priority to the debentures. Afterwards the liquidator took proceedings under s. 10 without making any bargain with the debenture-holders. Apart from contract, their right is to say, "Hand us over the fund."]

The money received under s. 10 was not property coming in in the lifetime of the company, but only damages recovered after its death.

[VAUGHAN WILLIAMS J. The damages were not measured in the lifetime of the company. But the right accrued on the wrong being done, and the wrong was done in its lifetime.]

The official receiver, the officer of the Court, may proceed under s. 10 even if the liquidator does not do so; and the Legislature did not intend that what the Court's officer recovered should belong to debenture-holders without its being subject to costs of proceedings necessary to bring the power to recover the money into existence.

But after the winding-up order the power of the debenture-holders to recover calls is gone, and they can only be got in for their benefit by the liquidator in the winding-up, who is brought into existence at the expense of the petitioner: *Fowler* v. *Broad's Patent Night Light Co.* (1)

[VAUGHAN WILLIAMS J. You killed the directors who might have enforced the call for the benefit of the debenture-holders; and after that you say they are to suffer because the liquidator, whom you brought into existence, is the only person who can get in the calls.]

Eustace Smith, for the debenture-holders, was not called upon.

VAUGHAN WILLIAMS J. I have no doubt myself that the view taken by Mr. Mason, the mortgagee of the solicitor who acted for the petitioning creditor in the matter of the petition, is wrong. I am asked to say that, because certain misfeasance proceedings have been taken which resulted in an order that contribution should be made by certain persons to the assets of the company, and because the liquidator has realized certain money by proceedings which he has taken to enforce calls against

(1) [1893] 1 Ch. 724.

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BRABOURNE *v.* SAME.

shareholders, therefore the debenture-holders are not to be allowed to enforce their rights against this fund, which is admittedly included in their security, without the costs of the petitioning creditor being first provided for. It is said that the case comes within the principle of salvage because the particular proceedings which have been taken under s. 10 of the Companies (Winding-up) Act, 1890, could not have been taken unless there had been a winding-up order; and there could not have been a winding-up order unless there had first been a petition. That is true; but it does not seem to me that it brings these costs within any such doctrine as to salvage as is stated. If the application had been that there should be deducted from this fund, which was brought into existence in the manner stated, the costs of recovering it, for all I know I should have been prepared to make an order to that effect; but I am not asked here to do that. What I am asked to deduct are the costs of the petition, and I cannot make any such order.

It was not contended before me that the money which has been contributed to the assets, owing to the proceedings under s. 10, is not covered by debentures such as those issued by this company. Upon that I can only say that, speaking for myself, I am very sorry that such should be the state of the law at the present moment. I cannot help thinking that when the question was first raised a different conclusion might have been arrived at, and it might very well have been held that such sums were outside the security. However, a contrary view has been taken and is now generally held, and I accept it. My hope now is that the Legislature may think fit to interfere. It seems to me to be an unwholesome state of things that the debenture-holders should have the control of money which has to be recovered by the officer of the Court by proceedings for misfeasance. It continually happens in practice that the debenture-holders and the promoters and officers of the company are intimately associated with each other, and then a winding-up comes, and there is not sufficient money to pay the debenture-holders in full, and in all probability the debenture-holders have acquired their debentures under such circumstances that they only expect to receive a percentage of their investment; and frequently, if they receive

that, they are not only satisfied, but justly so, as they are making a large profit. In this state of things a claim often arises against officers and promoters of the company in respect of what is a fraud not only on the company, but on the unsecured creditors, and the debenture-holders are so connected with the officers or promoters that they often step in when proceedings are threatened and say, "We do not think it is worth while to go to the expense of taking proceedings to recover anything from the officers or promoters; and, moreover, the estate is ours, and we do not assent to other persons enforcing the claim." I say this is an unwholesome state of things; and I hope the time will come when funds arising from proceedings for misfeasance will not be chargeable in favour of debenture-holders, but will be free from the debentures and available for the benefit of the unsecured creditors. But that is not the present state of the law, and I am therefore bound to hold that the solicitor and his assignee are not entitled to have the costs of the petition paid out of this fund.

Solicitors for the official receiver and the mortgagee of costs: *Gush, Phillips, Walters & Williams.*

Solicitor for the debenture-holders: *Harold A. Farman.*

F. E.

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Case as between cestuis que trust.] A solicitor paid money which he had received for a client to his own banking account. From that time up to the death of the solicitor there was always to the credit of the account a balance exceeding the sum so paid in. But on many days during that period the credit balance was less than the amount of other clients' moneys which the solicitor had paid in subsequently to his payment of the money of the first client and had not withdrawn:—*Held*, that the rule in *Clayton's Case* (1 Mer. 572) applied, and that the money of the first client must be taken to have been drawn out by the solicitor, and therefore not to have formed part of the balance to the credit of the account at the time of his death; and consequently that the first client was not entitled to be paid out of that balance specifically.—*Hancock* v. *Smith* (41 Ch. D. 456) distinguished. *In re* STENNING. WOOD *v.* STENNING - - - - - 433

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BANKRUPTCY—"*Order and Disposition*"—"*Reputed Owner*"—"*True Owner*"—*Consent—Settlement—Trustees declining Trusts — Cestuis que Trust—Married Woman—Restraint on Anticipation—Infants—Bankrupt Law Consolidation Act*, 1849 (12 & 13 *Vict. c.* 106), *ss.* 125, 141—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 44 (*iii.*).] Where the trustees named in a settlement of property of a person who afterwards becomes bankrupt have never executed or had any knowledge of the settlement, or, on being informed of it, decline the trusts, the beneficiaries, and not the trustees, are the "true owners" for the purpose of giving the necessary "consent and permission" to the property being in the "order or disposition" of the bankrupt as "reputed owner" at the commencement of his bankruptcy, so as to render the property available for his creditors: and such consent and permission can only be effectually given by the beneficiaries when they are persons capable of giving it, and not, for instance, married women restrained from anticipation or infants.—Compare Bankrupt Law Con-

BANKRUPTCY—*continued.*
solidation Act, 1849, s. 125, and Bankruptcy Act, 1883, s. 44 (iii.). *In re* MILLS' TRUSTS [C. A. 564

2. —— *Order and Disposition—Book Debts—Mortgagees of—Notice of Assignment—Receiver—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 44 (*iii.*), *s.* 49 (*d*)—*Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 19, *sub-s.* I., *cl. iii.*, *s.* 24.] In order to take book debts out of the order and disposition of an assignor the assignee must give notice to the debtors, and take every possible step to obtain possession of the debts.—A mortgagee of book debts who, without notice of any act of bankruptcy by the mortgagor, gives the debtors notice of his assignment is entitled to the protection conferred by the Bankruptcy Act, 1883, s. 49.—Although, from the absence of notice, consent on the part of the true owner to a debt remaining in the order and disposition of a bankrupt is primâ facie to be inferred, the inference will be rebutted if the true owner takes every possible step to obtain possession of the debt, or if his failure to obtain possession is not attributable to his own fault.—In 1891 a trader assigned, inter alia, his business premises and book debts by way of mortgage. On May 9, 1893, the mortgagees, under the powers of the Conveyancing Act, 1881, appointed A. B. receiver of the income of the mortgaged property, and he entered into possession of the premises and carried on the business. On May 16 the trader committed an act of bankruptcy, and on May 17 the mortgagees, without notice of this act, commenced an action in which A. B. was on May 19 appointed receiver of the book debts by the Court. Neither the mortgagees nor A. B. ever gave notice of the assignment to the debtors; and A. B. received certain moneys paid in respect of the book debts. On June 16 a receiving order was made against the trader, and he was subsequently adjudicated bankrupt:—*Held*, (1.) that neither the appointment of a receiver by the mortgagees nor that by the Court was sufficient to take the book debts out of the order and disposition of the bankrupt with the consent of the true owners, unless followed by notice to the debtors within a reasonable time; and *held*, (2.) that as by the default of the mortgagees no such notice was given, the trustee in bankruptcy was entitled to the book debts and the moneys received in respect thereof. RUTTER *v.* EVERETT - - 872

3. —— *Undischarged Bankrupt — After-acquired Property — Leaseholds — Intervention of Trustee—Property vesting in Trustee—Disclaimer —Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 44, 54, 55, 168.] The proposition laid down in *Cohen* v. *Mitchell* (25 Q. B. D. 262), that until the trustee intervenes all transactions by a bankrupt after his bankruptcy with any person dealing with him bonâ fide and for value, in respect of his after-acquired property, are valid against the trustee, though not intended to apply to freeholds, as laid down by *In re New Land Development Association and Gray* ([1892] 2 Ch. 138), must be taken to apply to leaseholds.—Leases for terms of years and subject to onerous covenants were granted to an undischarged bankrupt, and were subsequently demised by him by way of

BANKRUPTCY—*continued.*
mortgage, without any intervention by his trustee in bankruptcy; a purchaser from the mortgagees objected that no title could be made:—*Held*, that until the trustee intervened the bankrupt could deal with his after-acquired leaseholds, and that the purchaser could be forced to accept the title.—Whether s. 55 of the Bankruptcy Act, 1883, enables a trustee to disclaim after-acquired leaseholds, *quære*. *In re* CLAYTON AND BARCLAY'S CONTRACT - - - - - 212

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CHARITY—*Will—Gift, whether Charitable—Purpose beneficial to the Community—Gift to encourage Sport of Yacht Racing—Perpetuity.*] A testator bequeathed a fund in trust to provide annually for ever a cup to be given to the most successful yacht of the season, stating that his object in giving the cup was to encourage the sport of yacht-racing:—*Held* (affirming the decision of Kekewich J.), that a gift for the encouragement of a mere sport, though it might be beneficial to the public, could not be upheld as charitable.—*In re* NOTTAGE. JONES *v.* PALMER - C. A. 649

2. —— *Will—Power to appoint for "some Charitable Purpose"—Gift to Anti-Vivisection Society.*] Societies for the suppression and abolition of vivisection are charities within the legal definition of the term "charity." *In re* FOVEAUX. CROSS *v.* LONDON ANTI-VIVISECTION SOCIETY 501

—— Marshalling—Pure and impure personalty
See WILL. 7. [449

CLASS—Per stirpes or per capita - - 196
See WILL. 3.

CODICIL—Revocation of gift—Substitution of another gift - - - 256, 778
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COMMERCIAL COURT—Transfer of commercial cause—Evidence - - - 488
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COMMITTEE—Lunatic—Bankruptcy of lunatic
See LUNATIC. 1, 2. [730, 799

COMPANY—*Debentures—Floating Security—Garnishee Order.*] The holder of a debenture constituting only a floating security while the company is carrying on business cannot, if the company has not been wound up and a receiver has not been appointed, require by notice that a particular debt owing to the company shall be paid to him or not to the company; and a fortiori, if a garnishee order absolute has been obtained attaching the debt, the garnishee may pay it to the judgment creditor notwithstanding any such notice.—Words in a debenture prohibiting a company from creating a prior "charge" are to be read strictly, and do not extend to defeat the rights obtained under a garnishee order. ROBSON *v.* SMITH - - - - - 118

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2. —— *Debentures—Floating Security—Execution Creditor—Intervention of Debenture-holders after Seizure in Execution—Sale—Priorities—Interpleader.*] On February 9 a creditor recovered judgment against a limited company for 51*l.* 12*s.* and costs, and on the 14th levied execution. On the 16th, holders of debentures which gave a floating security on all the property of the company the plaintiffs, commenced an action to enforce their securities: on the 18th notice of this action was given to the execution creditor, and notice was given to the sheriff that the goods seized belonged to the plaintiffs. On the 21st the plaintiffs, being informed that the sheriff was about to sell, issued a writ in the present action, and obtained an ex parte injunction to prevent the sale. Notice of the injunction arrived too late to stop the sale, but it was stopped by the plaintiffs' solicitor handing to the sheriff's officer 70*l.* under protest, with a letter requiring the sheriff to issue an interpleader summons as to it, and stating that the payment was made without prejudice to any rights of the plaintiffs. On the 22nd a receiver was appointed in the debenture-holders' first action. Kekewich J. held that the 70*l.* belonged to the debenture-holders. The execution creditor appealed:—*Held*, by the Court of Appeal, that the goods seized could not be treated as having been sold, and that the title of the debenture-holders to them must prevail over that of the execution creditor; that the 70*l.* was to be treated as deposited with the sheriff's officer to abide the result, and that the execution creditor had no title to it:—*Held*, further, that the proper course would have been for the sheriff to take out an interpleader summons when he received the notice of February 18.—*Quære*, as to the priorities in case of actual sale and payment of the proceeds to the execution creditor. Taunton *v.* Sheriff of Warwickshire - C. A. 319

3. —— *Debentures—Floating Security—Mortgage of Assets of a Company.*] The M. company issued a set of debentures by each of which the company undertook to pay the principal at a distant day, and to pay interest on given days half-yearly in the meantime, and the company charged "by way of floating security" all its property, present and future, with the payment. A condition indorsed on the debentures provided that "Notwithstanding the said charge the company shall be at liberty in the course and for the purpose of its business to use, employ, sell, lease, exchange, or otherwise deal with any part of its property until default shall be made in payment of any interest hereby secured for the period of three calendar months after the same shall have become due," or until order or resolution for winding-up. After an instalment of interest had fallen more than three months into arrear, but before the debenture-holders had taken any steps to enforce their security, the company issued a set of bonds and mortgaged a specified part of its assets to secure the payment of them:—*Held*, by the Court of Appeal (reversing the decision of North J.), that as to the property comprised in their security, the bond-holders had priority over the debenture-holders, for that after the expiration of the three months the security of the debenture-holders remained a floating security until they took some steps to enforce it and stop the company from carrying on its business, and the security while floating did not prevent the company from mortgaging the assets. Government Stock Investment and Other Securities Company *v.* Manila Railway Company C. A. 551

4. —— *Debentures — One-man Company — Limited Liability—Sole Trader—Winding-up—Liability to indemnify Company in respect of Debts.*] S., a solvent trader, being desirous of carrying on his business with limited liability, caused a limited company to be registered for that purpose with a nominal capital of 40,000*l.* in 1*l.* shares. The memorandum of association was subscribed by himself, his wife, his daughter, and his four sons, for one share each, i.e. for seven shares in all. Twenty thousand shares were afterwards allotted to S., but no other shares in the company than the above 20,007 were ever taken. Debentures forming a floating security on the capital were issued to S. in part payment of the amount for which he purported to sell his business to the company. The business went on under the management of S. as managing director, and in a few months an order was made for winding up the company compulsorily. Vaughan Williams J. held that the company was the mere nominee of S.; that if his nominee had been an individual the nominee could have called on S. as his principal to indemnify him from the business liabilities; that the fact of the nominee being a company made no difference; and that S. must indemnify the company against the debts which its assets were insufficient to pay. S. appealed:—*Held*, by the Court of Appeal, that the formation of the company and the issue of the debentures were a mere scheme to enable S. to carry on his business in the name of the company with limited liability contrary to the true intent and meaning of the Companies Act, 1862, and to enable him to obtain priority over other creditors of the company by means of the debentures, and that the appeal must be dismissed.—*In re British Seamless Paper Box Co.* (17 Ch. D. 467) distinguished. Broderip *v.* Salomon - C. A. 323

5. —— *Debentures — One-man Company — Power to issue Debentures in satisfaction of Debts of Founder of the Company.*] The directors of a company had power under their articles to borrow or raise money by the issue of debentures. The company was formed to take over the business of P., and was bound by an agreement to indemnify him against the debts and liabilities shewn in a balance-sheet mentioned in the agreement, among which was a debt due to the plaintiff. P. was managing director of the company, and he and his brother were sole acting directors. They issued debentures to the plaintiff and other creditors of P., which they accepted in satisfaction of their debts. Shortly afterwards the company was ordered to be wound up. The plaintiff brought an action on behalf of himself and other debenture-holders for a receiver:—*Held* (reversing the decision of Vaughan Williams J.), (1.) that although the debentures were not issued literally for the purpose of borrowing or raising money for the company, their

COMPANY—*continued.*
issue to pay debts of P. for which the company was ultimately liable was within the powers of the directors; (2.) that there was no conflict of interest between P. and the company in its corporate capacity, and that the debentures were therefore in fact issued for the benefit of the company and were valid:—*Held*, also (affirming the decision of Vaughan Williams J.), that the issue of the debentures was not a fraudulent preference of some of the creditors of the company. SELIGMAN *v.* PRINCE & Co. - - **C. A. 617**

6. —— *Debenture Stock—Borrowing Powers—Priority—Companies Clauses Act*, 1863 (26 & 27 *Vict. c.* 118), *ss.* 22, 24—*Railway Companies Act*, 1867 (30 & 31 *Vict. c.* 127), *s.* 24.] The 24th section of the Companies Clauses Act, 1863, which enacts that the holders of debenture stock shall not as among themselves be entitled to any priority, applies only to debentures issued under the same special Act, and not to all debentures issued by the same company.—The 24th section of the Railway Companies Act, 1867, which empowers railway companies to issue debenture stock subject to the provisions of Part III. of the Companies Clauses Act, 1863, applies to all railway companies which have power to raise money by mortgage or bond, although their special Act does not incorporate Part III. of the Companies Clauses Act, 1863. *In re* MERSEY RAILWAY COMPANY - - - - **C. A. 287**

7. —— *Directors—Power to refuse to register Transfer—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 35.] The rule that directors who have power to refuse to register a transfer of shares are not bound to disclose their reasons for refusing, if they have considered the question and have acted bonâ fide, applies to cases where their power is limited to particular grounds for refusal as well as to cases where their power is absolute. —Directors who had power under their articles to refuse to register a transfer if in their opinion the transferee was not a desirable person to admit to membership, resolved, at a meeting held to consider the propriety of registering the transfer, that the registration of the transfer should be refused, without giving any reason for their refusal:—*Held* (reversing the decision of Kekewich J.) that, in the absence of any evidence that the directors had not acted bonâ fide, the refusal could not be questioned. *In re* COALPORT CHINA COMPANY - - - **C. A. 404**

8. —— *Dividends—Depreciation of Assets—Liability of Company to make good before Payment of Dividend—Trading Company.*] A company was formed in 1887 to purchase and carry on an existing carriers' business, under articles which provided that no dividend should be payable except out of profits arising out of the business of the company.—The capital of the company was 120,000*l.*, in 12,000 shares of 10*l.* each, of which 7000 carried the right to a preferential cumulative dividend, and 5000 were ordinary shares.—The price paid by the company for the business was 54,000*l.* in cash and 50,000*l.* in ordinary shares. The 7000 preference shares were issued and fully paid up in cash, out of which 54,000*l.* was paid to the vendor, to whom were also allotted, as fully paid up, the whole of

COMPANY—*continued.*
the ordinary shares.—In taking the yearly accounts substantial allowances were made for depreciation of leases, goodwill, and plant, and charges were made against income for maintenance of plant and repairs to buildings.—In 1893 no dividend was paid, and according to a valuation made in 1894 the assets of the company, including goodwill, fell short of the nominal capital by about 43,000*l.*, but the profit and loss account for the same year shewed a profit of 5816*l.*, which the company proposed to apply in the payment of a dividend on the preference shares. On an application by a holder of ordinary shares for an injunction to restrain the payment of the dividend:—*Held*, applying the principles laid down in *Verner* v. *General and Commercial Investment Trust* ([1894] 2 Ch. 239), that the dividend might lawfully be paid. WILMER *v.* MCNAMARA & Co., LIMITED - **245**

9. —— *Reduction of Capital—Alteration of Memorandum—Evidence—Companies Act*, 1867 (30 & 31 *Vict. c.* 131)—*Companies Act*, 1877 (40 & 41 *Vict. c.* 26)—*Companies (Memorandum of Association) Act*, 1890 (53 & 54 *Vict. c.* 62).] Where a petition is presented for the confirmation by the Court of resolutions for reducing a company's capital or altering its memorandum of association, a copy of the memorandum and articles, and the original minute-book of the proceedings of general meetings, should be made exhibits to the affidavit in support of the petition. —And where the reduction is to be effected by cancelling paid-up capital which has not been paid up in cash, it must be proved that the shares were issued pursuant to a contract filed under s. 25 of the Companies Act, 1867. *In re* OMNIUM INVESTMENT COMPANY - - - **127**

10. —— *Reduction of Capital—Assets—Investment—Surrender of Part to improve Value of Remainder—Ultra vires—Companies Acts*, 1867 *and* 1877 (30 & 31 *Vict. c.* 131; 40 & 41 *Vict. c.* 26).] A limited company, having power to invest its capital, and acting within the scope of its business as described in its memorandum of association, is at liberty to surrender part of a particular investment with a view to improving the remainder; and such a surrender is not a "reduction of capital" within the Companies Acts, 1867 and 1877.—Thus, where a limited financial corporation, holding shares in a railway company whose shares had become valueless through inability to complete its line for want of sufficient capital, proposed, as part of a scheme for raising further capital, to surrender some of their shares, and so, by assisting to promote the completion of the line, to give a substantial value to their remaining shares:—*Held*, that this was not a "reduction of capital" requiring the sanction of the Court under the above Acts. THOMSON *v.* TRUSTEES, EXECUTORS, AND SECURITIES INSURANCE CORPORATION - - - - **454**

11. —— *Reduction of Capital — Founders' Shares, Extinguishment of—Confirmation by the Court—Companies Acts*, 1862 (25 & 26 *Vict. c.* 89), *s.* 53; 1867 (30 & 31 *Vict. c.* 131), *s.* 11; *and* 1877 (40 & 41 *Vict. c.* 26), *ss.* 3, 4.] An investment company, whose capital was divided into founders', preference, and ordinary shares, had by deprecia-

COMPANY—*continued.*

tion in the value of its investments suffered a considerable loss of capital, and there appeared to be no reasonable prospect of anything ever coming to the holders of the founders' shares, either in respect of capital or dividend. By the constitution of the company the founders' shares were, in the event of liquidation, to bear in the first instance losses of capital. The memorandum of association provided that preference shares might be issued on such terms as the company should by special resolution determine. Shares preferred both as to capital and dividend were issued by the directors without any special resolution having been passed; but at meetings subsequently held and attended by all classes of shareholders resolutions were unanimously passed adopting the terms under which the preference shares were issued. The company presented a petition for the confirmation by the Court of resolutions for reduction which involved the total extinction of the founders' shares and threw the remainder of the loss upon the ordinary shares:—*Held*, (1) that the issue of the preference shares without the passing of a special resolution was capable of ratification by the company and had been ratified; and (2) that the scheme of reduction was not unfair and ought to be sanctioned. *British and American Trustee and Finance Corporation* v. *Couper* ([1894] A. C. 399), *Bannatyne* v. *Direct Spanish Telegraph Co.* (34 Ch. D. 287), and *In re Floating Dock Co. of St. Thomas* ([1895] 1 Ch. 691) applied. *In re* London and New York Investment Corporation - - 860

12. —— *Reduction of Capital—Special Resolutions—Petition for Confirmation by Court—Power of Court to dispense with settling List of Creditors—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 13—*General Order of March* 21, 1868.] Upon a petition for the confirmation by the Court of a special resolution for the reduction of the capital of a company involving the diminution of liability in respect of unpaid capital and the return of paid-up capital to shareholders, the Court has no power to dispense with the settling of the list of creditors required by s. 13 of the Companies Act, 1867, even though there may be evidence before the Court that the company has no debts unsatisfied. *In re* Lamson Store Service Company, Limited. *In re* National Reversionary Investment Company, Limited [726

13. —— *Shares—Rectification of Register—Fully-paid Shares—Neglect to register Written Contract—Winding-up—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 35—*Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.] Agreement for the sale to the P. Company of fully-paid shares in the C. Company in consideration of the allotment, to the holders of the shares, of fully-paid shares in the P. Company, provided that before the issue of any of the shares to be allotted a sufficient contract in writing should be filed with the Registrar of Joint Stock Companies. By mistake the contract was not filed until after the shares had been issued. On discovering the mistake, one of the allottees gave notice of motion for an order to rectify the register; but before the motion was heard the company was ordered to be

COMPANY—*continued.*

wound up:—*Held*, that rectification should only be ordered on the terms that due provision should be made for all the debts and liabilities of the P. Company which had accrued between the dates of issuing the shares and giving the notice of motion. *In re* Preservation Syndicate 768

14. —— *Shares—Fully paid-up—Registration of Contract—Winding-up—Contributory—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.] A contract need not, in order to comply with s. 25 of the Companies Act, 1867, be made directly between the allottee of the shares and the company the shares of which are to be issued; and it need not shew on the face of it which particular shares are to be allotted, although the onus lies on the allottee to shew that his shares are within the registered contract. It was agreed in writing between the S. Company and a trustee for the C. Company (then being formed) that the latter company should purchase from the former certain patent rights, the consideration to be shares in the C. Company or cash. The C. Company was to allot to every shareholder in the S. Company who should apply for the same shares of 1*l.* each in the C. Company, with 19*s.* per share credited as paid up in respect of shares held by the applicant in the S. Company. The C. Company when incorporated adopted the agreement by executing a deed thereon indorsed. The agreement and deed having been filed with the Registrar of Joint Stock Companies, E. and M., who were not shareholders in the S. Company, but nominees of shareholders entitled to shares in the C. Company, applied for and were allotted shares in the C. Company, and on paying 19*s.* per share were registered as holders of fully paid shares:—*Held*, that s. 25 of the Companies Act, 1867, had been complied with. *In re New Eberhardt Co.* (43 Ch. D. 118) distinguished. *In re* Common Petroleum Engine Company. Elsner and McArthur's Case - - - 759

15. —— *Winding-up — Debenture-holders — Costs of Petitioner—Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 10.] Moneys recovered in a winding-up (*a*) in proceedings under s. 10 of the Companies (Winding-up) Act, 1890, and (*b*) by calls on contributories, belong to the holders of debentures charging all the undertaking and property of the company, present and future, including its uncalled capital for the time being, and are not, where the total assets are not sufficient to pay the debenture-holders in full, subject to costs directed by the winding-up order to be paid out of the assets of the company. But, *semble*, that the costs incurred by the liquidator in proceedings under s. 10 must be paid out of the money recovered in those proceedings. *In re* Anglo-Austrian Printing and Publishing Union. Brabourne *v.* Same - - 891

16. —— *Winding-up — Investment — "Depreciation" or "Appreciation"—Restitution to Revenue—Earnings since Liquidation—Capital and Income.*] An investment made by a limited company on capital account having fallen in value, the amount of depreciation was, in the half-yearly accounts, debited to revenue.—When the company afterwards went into liquidation, the investment had risen again in value, and the

COMPANY—*continued.*
liquidator in his accounts credited to revenue as "appreciation" the amount which had previously been debited as depreciation:—*Held*, that the amount credited by the liquidator to revenue as "appreciation" must be treated as income, and not as capital, it being merely a restitution to profits of what had been previously taken from profits.—Earnings by a limited company since the commencement of its liquidation are capital and not income.—*In re Bridgewater Navigation Co.* ([1891] 2 Ch. 317) applied. BISHOP *v.* SMYRNA AND CASSABA RAILWAY COMPANY (No. 2) [596

17. —— *Winding-up—Misfeasance of Officers—Auditors—Banking Company—Companies Act*, 1879 (42 & 43 *Vict. c.* 76), *s.* 7—*Companies* (*Winding-up*) *Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 10.] Auditors who have been appointed by a banking company in pursuance of the Companies Act, 1879, s. 7, and are spoken of as officers of the company in the articles of association, are officers within the meaning of the 10th section of the Companies (Winding-up) Act, 1890, and if guilty of misfeasance may be made liable in proceedings under that section. *In re* LONDON AND GENERAL BANK - - - C. A. 166

18. —— *Winding-up—Misfeasance of Officers—Banking Company—Duty of Auditors in framing their Certificate—Companies Act*, 1879 (42 & 43 *Vict. c.* 76), *s.* 7—*Companies* (*Winding-up*) *Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 10.] Although it is not the duty of the auditors of a company, appointed under the Companies Act, 1879, to consider whether its business is prudently or imprudently conducted, it is their duty to consider and report to the shareholders whether the balance-sheet exhibits a correct view of the state of the company's affairs, and the true financial position of the company at the time of the audit. They must ascertain this by examining the books of the company, and must take reasonable care that what they certify as to the company's financial position is true. And except in very special cases it is their duty to place before the shareholders the necessary information as to the true financial position of the company, and not merely to indicate the means of acquiring it.—An auditor presented a confidential report to the directors calling their attention to the insufficiency of the securities on which the capital of the company was invested, and the difficulty of realizing them, but in his report to the shareholders merely stated that the value of the assets was dependent on realization; and in the result the shareholders were deceived as to the condition of the company, and a dividend was declared out of capital and not out of income:—*Held* (affirming the decision of Vaughan Williams J.), that the auditor had been guilty of misfeasance under s. 10 of the Companies (Winding-up) Act, 1890, and was liable to make good the amount of the dividend paid. *In re* LONDON AND GENERAL BANK (No. 2) [C. A. 673

19. —— *Winding-up—Private Examination—Depositions—Inspection—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 115—*Companies Winding-up Rules, April*, 1892, *rr.* 11, 32.] In the winding-up of a company—at any rate under a compulsory

COMPANY—*continued.*
order—every contributory, and every creditor whose claim or proof has been admitted, is entitled, as of right, to inspect and take copies of all depositions of evidence taken at a private examination under s. 115 of the Companies Act, 1862, whether the evidence was given by himself or by other persons. *In re* STANDARD GOLD MINING COMPANY - - - - 545

20. —— *Winding-up — Profits — Earnings before Liquidation—Undrawn Profits—Preference Shareholders—Loss of Capital—Costs of Liquidation—Priority.*] A sum of money standing to the revenue account of a limited company at the date of the commencement of the liquidation of the company, and representing net profits earned by the company down to that date, is applicable in the liquidation to the payment of arrears of dividend due at that date to the preference shareholders, in priority to the payment of a deficit on the capital account and of the costs of the liquidation. BISHOP *v.* SMYRNA AND CASSABA RAILWAY COMPANY - - - - - 265

21. —— *Winding-up—Receiver and Manager—Right to Indemnity—Debentures—Priority.*] A joint stock company for building operations, which had some uncompleted contracts, got into difficulties. An action against the company was brought by a debenture-holder, and a petition for winding up was presented by an unsecured creditor. By a consent order in the matter of the winding-up petition it was ordered that 5000*l.* should be raised by the plaintiff in the action and the unsecured creditors in order to complete the contracts, which sum was to be a first charge on the assets of the company in priority to all the debentures, that all the unsecured creditors should have second debentures given them, that two receivers and managers should be appointed, one of whom was nominated by the unsecured creditors, to carry on the business, but the company was to incur no fresh debts or liabilities. 4250*l.* was accordingly raised; but the receivers and managers in completing the contracts incurred considerable further expenses, for which they claimed to be indemnified:—*Held* (reversing the decision of Vaughan Williams J.), that the receivers and managers were entitled to be indemnified out of the assets of the company in priority to the persons who advanced the 4250*l.*, as well as to the holders of debentures. STRAPP *v.* BULL, SONS & CO. SHAW *v.* SCHOOL BOARD OF LONDON - - - - - - C. A. 1

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COPYRIGHT — *Design — Registration — Infringement—Patents, Designs, and Trade Marks Act,* 1883 (46 & 47 *Vict. c.* 57)—*Idea underlying Design not protected by Registration.*] Registration of a design does not protect the idea of the designer, but only the actual design.—The plaintiffs registered a design consisting of a church window of a particular style of architecture with tracery above and below, which they applied in metal work to the sides of upright hexagonal oil stoves. The defendants, adopting the idea of the plaintiffs, produced a design consisting of a church window of a different style of architecture with different tracery above and below, which they also applied in metal work to the sides of upright hexagonal oil stoves:—*Held*, that, as the two designs were essentially different, the defendants' design was not an infringement of the plaintiffs'. JOHN HARPER & CO., LIMITED *v.* WRIGHT & BUTLER LAMP MANUFACTURING COMPANY, LIMITED 593
[*Reversed on Appeal.*]

2. —— *Newspaper — Selections of Winning Horse—Piracy—Copyright Act,* 1842 (5 & 6 *Vict. c.* 45), *ss.* 18, 19.] The Court will not define in general terms what amounts to a literary composition.—The plaintiff, who was the publisher of a registered weekly periodical, inserted each week, under the title of "One Horse Selections," a list of horses which he expected to win at races in the ensuing week. The defendants published each day at race-meetings a sheet or card giving, under the title, "The Specials, One Horse Finals," a list of horses which the plaintiff and other sporting authorities had selected as likely to win in races on that particular day, with the names of those who had selected them:—*Held* (affirming the decision of Kekewich J.), that the announcement of the horses which the plaintiff had selected as winners was not in the nature of a literary composition which could be protected under the Copyright Acts; and that the defendants had not infringed the copyright in the plaintiff's periodical. CHILTON *v.* PROGRESS PRINTING AND PUBLISHING COMPANY - - - C. A. 29

3. —— *Picture — Photograph — "Author" — Photograph made for "good and valuable Consideration" and "for or on behalf of" a Person—Penalty — Persons liable — Fine Arts Copyright Act,* 1862 (25 & 26 *Vict. c.* 68), *ss.* 1, 6.] The "author" of a photograph within the meaning of s. 1 of the Fine Arts Copyright Act, 1862, is the person who generally controls the operation of taking the photograph, and a person who performs the manual operations under his control and direction is not the author.—A photographic portrait taken on the terms that the photographer may sell copies, though without payment by the subject to the photographer, is made for a "good and valuable consideration" within the proviso in the above-mentioned section: but where it is the intention of the parties that the negative shall be kept by the photographer as his own property, the photograph is not made "for or on behalf of" the subject, and therefore the proviso does not apply.—The words "any other person" in s. 6 of the Fine Arts Copyright Act, 1862, mean any person other than the author, and consequently include the person photographed if he is not the author. MELVILLE *v.* MIRROR OF LIFE COMPANY - - - - - 531

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DIVIDEND—Payment out of capital—Depreciation of assets - - - 245
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EASEMENT—*Air—Right to Access of Air—Stagnation of Air—Nuisance.*] A right to have air come over a neighbour's land in a particular channel to a particular place may be established by immemorial user; but, in the absence of actual contract, no one can claim a right to have the general current of air over his neighbour's property to his property kept uninterrupted.—The plaintiffs' house was in a terrace fronting east. The defendant's house adjoined it and was the most northerly house in the terrace. On the north was an open square. Along the back of the terrace was a space twenty-eight feet wide, bounded on the west by a high wall, and divided into yards to the terrace houses. Opposite to the plaintiffs' house at the back was a urinal used by a great number of people, and the conveniences of the houses in the terrace were ventilated at the back. The defendant raised by sixteen feet a low building which formed the northern boundary of his yard. This erection to some extent darkened the plaintiffs' ancient lights and caused a stagnation of air in their yard, so that the exhalations from the urinal and conveniences were not carried off, and the plaintiffs' house became less healthy through want of ventilation. Cave J. considered that the interference with light was trifling and might be compensated by 10*l.* damages, but that the interference with ventilation was serious; and his Lordship granted an injunction against the continuance of the new building:—*Held*, on appeal, that as the exhalations had not arisen from any act of the defendant, the stagnation in the plaintiffs' yard caused by the defendant's new building was not actionable either as an interference with a legal right or as a nuisance, and that the injunction must be discharged. CHASTEY *v.* ACKLAND - **C. A. 389**

EASEMENT—*continued.*

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EXAMINATION—Private—Winding-up—Copies of depositions - - - 545
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EXECUTION — Equitable — Reversion in real estate - - - - 411
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EXECUTION CREDITOR—Sale—Intervention by debenture-holder - - - 319
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EXECUTOR—*Administration—Debts—Pecuniary Legatee—Marshalling Assets—Real Estate charged with Debts.*] A testator, after directing payment of his funeral and testamentary expenses and debts, gave a legacy of 1500*l.* to his son S., and devised and bequeathed all his real and the residue of his personal estate upon trusts for sale and investment, to pay the income to his wife for life, and after her death to divide the estate among his children. The personal estate was insufficient to pay the legacy in full after satisfying the debts, funeral and testamentary expenses:—*Held*, that S. was entitled to have the assets marshalled so as to stand in the place of creditors against the real estate to the extent to which the personal estate had been applied in the payment of debts and funeral and testamentary expenses. —*In re Bate* (43 Ch. D. 600) not followed. *In re* SALT. BROTHWOOD *v.* KEELING - - 203

2. —— *Administration—Trust for Sale—Power to Postpone — Direction as to Interim Income—Power to carry on Business—Discretion of Trustees—Profits of Business pending Sale—Capital or Income.*] A testator devised and bequeathed his real and personal estate, which included his business, upon trusts for sale and conversion, the proceeds to be invested and to be held upon trust for his wife for life, and afterwards for his children. The will contained a power to postpone the sale,

EXECUTOR—*continued.*
with the usual direction that the income until sale should be paid to the same persons and in the same manner as the income of the trust estate. The trustees carried on the testator's business for twenty-two years, not with a view to a sale, but for the benefit of the widow, to whom the whole of the profits were paid as income:—*Held*, that the absolute discretion given to the trustees to postpone the sale involved a power to carry on the business during the period of postponement; that the trustees were justified in carrying on the business as they had done, and that the whole of the profits of the business had been properly paid to the tenant for life.—*In re Chancellor* (26 Ch. D. 42) discussed. *In re* CROWTHER. MIDGLEY *v.* CROWTHER - 56

FANCY WORD—Trade-mark - - 176
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FRAUD—Concealed—Statute of Limitations—Partnership - - - - 474
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GARNISHEE ORDER — Money ordered to be paid into court - - - 217
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GAVELKIND—Feoffment by infant heirs—Apportionment of purchase-money - 525
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GOODWILL—Partnership—Interest of deceased partner - - - - 223
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HUSBAND AND WIFE—*Married Woman—Reversion—Election.*] A separation deed executed in 1875, not acknowledged by the wife provided for payment by the husband of an annuity to the wife; who covenanted to release, when discovert a reversionary life interest in real and personal estate:—*Held*, that on the death of the husband the wife was not bound to release her life interest by having received the annuity.—The doctrine of election by a married woman discussed. HARLE *v.* JARMAN - - - - - 419

—— Restraint on anticipation—Consent to order and disposition of reputed owner 564
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—— Will of married woman—Married Women's Property Act, 1893 - - 116
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IMPROVEMENTS—Settled Land Act—Payment by tenant for life - - - 468
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INCOME—Intermediate — Contingent legacy — Woman past child-bearing - 348
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INCUMBRANCES—Discharge of on sale—Conveyancing Act, 1881 - - 256
See VENDOR AND PURCHASER. 4.

INFANT—*Maintenance—Contingent Gift of Leaseholds — Intermediate Income — Separation from General Estate of Testator—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 43.] A testator gave certain leasehold property to trustees upon trust to pay the income to his daughter during her life, and after her death upon trust to transfer the same to all her children in equal shares, the shares of sons to be vested in them at twenty-one, and of daughters at twenty-one or marriage. The testator made other specific bequests, and gave his residuary estate upon certain trusts for his children. The daughter died, leaving several children, all of whom were infants:—*Held*, that the effect of the bequest being to separate the leaseholds from the general estate of the testator, the intermediate income until one of the children attained a vested interest was applicable to the maintenance of the infant children.—*Kidman* v. *Kidman* (40 L. J. (Ch.) 359) followed.—*Furneaux* v. *Rucker* (W. N. (1879) 135) disapproved. Observations on the practice of relying on decisions briefly reported in the *Weekly Notes*. *In re* WOODIN. WOODIN *v.* GLASS - - - - - C. A. 309

2. —— *Maintenance—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 43 *—Contingent Interest—Income.*] Property was settled on trust for such members of a class (capable of increase) as should attain twenty-one: —*Held*, that the accumulated income was divisible into as many shares as there were members in existence; that one share was payable to each adult; and one share was applicable under s. 43 of the Conveyancing Act, 1881, for the maintenance of each infant. *In re* JEFFERY. ARNOLD *v.* BURT - - - - - 577

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INTEREST—Payment in bar of the Statute of Limitations—Presumption **100, 820**
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—— Rate of—Apportionment between tenant for life and remainderman - **537, 542**
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IRELAND—Lunacy—Irish property of English lunatic—Percentage payable to Court
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JUDGMENT—*Charge on Land—Reversion—Judgments Act*, 1838 (1 & 2 *Vict. c.* 110), *s.* 13—*Judgments Act*, 1864 (27 & 28 *Vict. c.* 112), *s.* 1.] A judgment debt is not enforceable as a charge on a reversion in real estate. HOOD BARRS *v.* CATHCART - - - - - **411**

—— Payment of money into Court—Garnishee order - - - - - **217**
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JURISDICTION—High Court of Justice—Setting aside agreement as to costs - **719**
See SOLICITOR. 1.

—— Service of Writ—Scottish defendant carrying on business in England - **630**
See PRACTICE. 15.

LANDLORD AND TENANT—*Covenant to keep in Repair—Measure of Damages.*] The measure of damages for breach of a covenant to keep demised property in repair is not the same in the case of an underlease as in that of a direct lease with a freehold reversion.—Where the underlessee has notice that there is a superior landlord, the immediate lessor's liability over to that landlord must be taken into account; and the cost of putting the property into repair at the end of the term may properly be considered for that purpose. EBBETTS *v.* CONQUEST - - - - - **C. A. 377**

2. —— *Peaceable Re-entry — Forfeiture of Lease—Right of Lessee to Relief—Bankruptcy of Lessee—Assignment of Lease by Trustee in Bankruptcy—Chose in Action*—4 *Geo.* 2, *c.* 28, *s.* 2 (*Preamble*)—*Common Law Procedure Act*, 1852 (15 & 16 *Vict. c.* 76), *s.* 212—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 44, 168.] The jurisdiction to grant to a lessee relief against the forfeiture of his lease for non-payment of rent is not confined to cases where the lessor has recovered possession by legal process, but extends to cases where the lessor has recovered peaceable possession without the assistance of any Court.—In such a case an order may be made under s. 212 of the Common Law Procedure Act, 1852, giving the lessee relief in equity, and declaring that he may hold and enjoy the demised lands according to the lease made thereof without any new lease. The right of a lessee to be relieved from the forfeiture of a lease is a chose in action which vests in his trustee in bankruptcy, and the trustee is entitled to sell such right and to assign it to a purchaser. HOWARD *v.* FANSHAWE - - **581**

LANDS CLAUSES ACT—*Compulsory Purchase—Costs of Arbitration—Award taken up and Fees paid by Landowner—Taxing Master's Certificate*—8 & 9 *Vict. c.* 18, *ss.* 34, 35.] A landowner whose claim against a railway company for the purchase-money of land compulsorily taken had been allowed, and who was entitled to the costs of the arbitration, paid the umpire's fees himself, and took up the award instead of waiting for this to be done by the company:—*Held* (affirming the decision of Romer J.), that the landowner could not recover the sum paid by him to the umpire in an action against the company:—*Held*, also, that the decision of the taxing master who had disallowed the sum so paid by the landowner as costs in the arbitration was conclusive and was not subject to review by the Court. EARL OF SHREWSBURY *v.* WIRRAL RAILWAYS COMMITTEE [C. A. 812

2. —— *Railway Company—"Part of any House or other Building or Manufactory"—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 92.] Part of a house was used for the purposes of a manufactory, and the other part was let to an under-tenant and not used for the purposes of the manufactory:—*Held*, that the part last mentioned was part of a manufactory, and a railway company proposing to take it was bound under s. 92 of the Lands Clauses Act to take the whole of the manufactory. BROOK *v.* MANCHESTER, SHEFFIELD AND LINCOLNSHIRE RAILWAY COMPANY [571

LAPSE—Limitations of personal estate framed as for real estate - - - **348**
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LEASE—Forfeiture—Relief against - **581**
See LANDLORD AND TENANT. 2.

LEASEHOLDS—Undischarged bankrupt—After-acquired property - - - **212**
See BANKRUPTCY. 3.

LEGACY DUTY - - - **517, 458**
See REVENUE. 1, 2.

LEVEL CROSSING—Severance of ownership
See RAILWAY. [129, 827

LIGHT—*Interlocutory Mandatory Injunction—Evading Service of Writ.*] The defendant was erecting a building near the plaintiffs' house. The plaintiff warned the defendant that if the building were continued he would sue to restrain it as an obstruction of his ancient lights. After action brought the defendant evaded service of the writ for several days, and in the meantime continued the building till substituted service on him was effected:—*Held* (affirming the decision of Kekewich J.), that the defendant's evasion of the writ brought the case within the principle of *Daniel* v. *Ferguson* ([1891] 2 Ch. 27), and that the plaintiff was entitled to an interlocutory mandatory injunction ordering the defendant to pull down so much of the building as had been erected after the plaintiff had warned the defendant that he intended to bring an action. VON JOEL *v.* HORNSEY - - - **C. A. 774**

LIGHT—*continued.*

[2. —— *Prescription Act* (2 & 3 *Wm.* 4, *c.* 71), *ss.* 3, 4—*Commencement of Right of Action.*] An inchoate title under the Prescription Act cannot be treated as complete even if effectual interruption before the title becomes absolute is impossible.—In an action to restrain interference with access of light, an interlocutory injunction was granted; but so as not to prevent building up to the height of houses removed more than nineteen and less than twenty years before action brought. LORD BATTERSEA *v.* COMMISSIONERS OF SEWERS FOR THE CITY OF LONDON - - - 708

LIMITATIONS, STATUTE OF—*Money charged on Land—Presumption of Payment of Interest by Devisee in Fee, being also Tenant for Life of the Money—Liability of Testator's Personal Estate—Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *s.* 8.] A testator, having covenanted with trustees for the payment of a sum of money after his death, to be held upon trusts under which his son was tenant for life, and charged the same with interest upon certain land, by his will devised the land subject to the charge to his son in fee. The money was never raised, nor any interest actually paid in respect of it; but the son entered into possession of the land, and for more than twelve years received the rents and profits:—*Held* (affirming the decision of Kekewich J.), that the son not being liable to pay the interest on the charge, no presumption of payment of interest by him on the ground of any duty to keep down the charge could be made; and therefore that the claim of the trustees under the covenant of the testator against his personal estate was barred by the 8th section of the Real Property Limitation Act, 1874. *In re* ENGLAND. STEWARD *v.* ENGLAND - - 100, C. A. 820

2. —— *Partnership Accounts—New Partnership—Concealed Fraud.*] A father and his two sons, J. and G., carried on business together as partners from 1856 to 1886, when the father died. There were no articles of partnership, and no settled accounts. After the father's death the two sons carried on the business as partners without winding up the old partnership and without coming to any settled account. J. died in 1893, and his executrix brought an action against G. for an account of the partnership dealings since the father's death in 1886. G. claimed to have the accounts of the old partnership taken from 1856, alleging that he had recently discovered (as he proved to be the fact) that J. during his father's lifetime fraudulently drew more than his share from the partnership funds, and that the fraud was concealed from his co-partners:—*Held* (reversing the decision of Wright J.), first, that, although the old partnership was terminated by the death of the father, the Statute of Limitations was no bar to taking the accounts before that date, the accounts having been carried on into the new partnership without interruption or settlement;—Secondly, that if the Statute of Limitations had applied, the fact that there had been concealed fraud would have been a bar to its operation, although such fraud might have been discovered at the time by G. if he had used due caution; a partner being entitled to rely on the good faith of his co-partners.—*Knox* v. *Gye* (L. R. 5 H. L. 656) distinguished.—*Rawlins* v. *Wickham* (3 De G. & J. 304) followed. BETJEMANN *v.* BETJEMANN - - - - C. A. 474

—— Breach of trust—Commencement of right of action—Tenant for life - 69
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LITERARY COMPOSITION—Copyright — Definition - - - - 29
See COPYRIGHT. 2.

LUNATIC—*Bankruptcy — Committee—Trustee — Adjudicating Lunatic Bankrupt—Jurisdiction—Title of Trustee—Discretion—Voluntary Settlement—Void Gift—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 47—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 1—*Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *ss.* 117, 120.] A lunatic can be adjudicated a bankrupt under the direction of his committee acting with the consent of the Court in Lunacy, but whether he can be so adjudicated independently of the Court of Lunacy, *quære*.—Upon a person being found lunatic, the jurisdiction of the Court in Lunacy immediately attaches to his property, including the discretionary powers vested in the Court by ss. 117 and 120 of the Lunacy Act, 1890, of applying his property for his benefit, and cannot be ousted by a subsequent adjudication in bankruptcy made without the consent of the Court, even assuming such adjudication to be valid (as to which, *quære*); and therefore the trustee taking the lunatic's property under such an adjudication can only do so subject to the jurisdiction in lunacy. — A voluntary settlement which is "void against the trustee" in bankruptcy of the settlor under s. 47 of the Bankruptcy Act, 1883, is void for all purposes, and does not entitle the trustee to stand in the place of the beneficiary so as to defeat a prior title to the settled property, such as the paramount jurisdiction of the Court in Lunacy where the settlor has, between the dates of the settlement and the adjudication in bankruptcy, been found lunatic. —*Sanguinetti* v. *Stuckey's Banking Co.* ([1895] 1 Ch. 176) approved. *In re* FARNHAM (A LUNATIC) - - - C. A. 799

2. —— *Bankruptcy—Practice—Parties—Action by Lunatic by his Committee—Trustee in Bankruptcy added as Defendant to Action — Rules of the Supreme Court*, 1883, *Order* XVI., *r.* 17; *Order* XXV., *r.* 4—*Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *ss.* 117, 120—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 122.] Where an action has been brought by the committee of a lunatic, and the lunatic is subsequently adjudicated bankrupt, the right of action vests in his trustee in bankruptcy; and if the trustee declines to prosecute the action he cannot be added as a defendant against his will. Where he has been so added he is entitled to have the action stayed as against him. FARNHAM *v.* MILWARD & Co. - 730

3. —— *Practice—Inquisition in England—Property in Ireland—Percentage on Annual Income—Sum for Maintenance remitted to England—Percentage payable to English Court of Lunacy—Lunacy Regulation (Ireland) Act*, 1871 (34 & 35 *Vict. c.* 22), *ss.* 109, 114—*Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *ss.* 148, 149—*Lunacy Act*,

LUNATIC—*continued.*

1891 (54 & 55 *Vict. c.* 65), *s.* 27, *sub-s.* 3—*Rules in Lunacy*, 1892, *r.* 126.] A lunatic was so found by inquisition in England and the record transmitted to Ireland, where all her property was situate; and a sum was remitted from Ireland to her committee in England for her maintenance. A percentage on her clear annual income was paid to the Court of Lunacy in Ireland:—*Held* (A. L. Smith L.J. dissenting), that the Court of Lunacy in England was not entitled to a similar percentage on the sum remitted to England for the lunatic's maintenance. *In re* GREHAN (A LUNATIC) - - - - **C. A. 12**

4. —— *Practice—Person in Victoria found Lunatic by Inquisition—English Stocks in Lunatic's Name—Transfer to Master in Lunacy in Victoria—Jurisdiction—Property of Lunatic "vested" in Master—Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *s.* 134—*Victoria Lunacy Act*, 1890.] Under s. 134 of the Lunacy Act, 1890, the Court in Lunacy has jurisdiction to order funds in this country standing in the name of a person resident abroad, and found lunatic by a foreign or Colonial Court, to be transferred to the committee, curator, or other person duly appointed by that Court to manage the lunatic's personal estate, although such personal estate is not actually "vested" in such committee, curator, or other person according to the law of this country.—A lady residing in the colony of Victoria was declared lunatic by the Supreme Court of the colony sitting in Lunacy, and the Master in Lunacy in the colony was appointed to manage her property, which consisted of English stocks standing in her name:—*Held*, that, under s. 134 of the Lunacy Act, 1890, the Court in Lunacy in this country has jurisdiction to order a transfer of the stocks to the Master in Lunacy in Victoria, and the Court being satisfied that all the stocks were required for the maintenance and support of the lunatic, made the order accordingly, prefaced with a statement that the personal estate of the lunatic was "vested" in the master within the meaning of that section. —"Vested," in s. 134, includes the right to obtain and deal with, without being actual owner of, the lunatic's personal estate.—*In re Barlow's Will* (36 Ch. D. 287) considered. *In re* BROWN (A LUNATIC) - - - - **C. A. 666**

MAINTENANCE—Infant—Contingent legacy *See* INFANT. 1, 2. [309, 577

—— Lunatic—Percentage payable on Irish property - - - - 12 *See* LUNATIC. 3.

MANAGER—Tramway company—Debentureholders - - - - 36 *See* TRAMWAY. 1.

—— Winding up of company—Indemnity—Priority - - - - 1 *See* COMPANY. 21.

MANDATORY INJUNCTION—Obstruction of light - - - - - 774 *See* LIGHT. 1.

MARSHALLING—Payment of debts and legacies *See* EXECUTOR. 1. [203

MARSHALLING—*continued.*

—— Pure and impure personalty—Charity 449 *See* WILL. 7.

MEASURE OF DAMAGES—Covenant to keep in repair - - - - 377 *See* LANDLORD AND TENANT. 1.

MEMORANDUM OF ASSOCIATION—Alteration—Evidence - - - - 127 *See* COMPANY. 9.

MISDESCRIPTION—Will—Debenture stock or shares - - - - 657 *See* WILL. 8.

MISTAKE—Compromise—Setting aside - 638 *See* PRACTICE. 4.

—— Consent order—Setting aside - - 273 *See* PRACTICE. 5.

—— Money paid under—Erroneous order of Court—Interest—Tenant for life and remainderman - - - 542 *See* TENANT FOR LIFE AND REMAINDERMAN. 2.

MORTGAGE—*Priority—Personal Estate—Assignment of Equitable Interest—Original and Derivative Trust—Notice to whom to be given.*] A son was entitled under the will of his father to a contingent interest in a fund paid into court in an action to administer the father's estate. The son died while the interest was still contingent, having bequeathed a share of such interest to his daughter who assigned such share successively to A. and B. B., who had no notice of A.'s assignment, obtained a stop order on the fund in Court. A. gave notice of his assignment to the son's legal personal representative.—Upon the interest falling into possession:—*Held*, that for the purpose of determining the priority between A. and B. the stop order had the same effect as notice to the father's executors would have had if the fund had not been in Court; that the proper person to receive notice of the assignments was the trustee of the assignor, namely, the legal personal representative of the son; and that, consequently, A. had priority over B.—*In re Booth's Settlement Trusts* (1 W. R. 444) overruled. —*Bridge* v. *Beadon* (L. R. 3 Eq. 664) observed upon.—*Holt* v. *Dewell* (4 Hare, 446) followed. STEPHENS *v.* GREEN. GREEN *v.* KNIGHT [C. A. 148

—— Book debts—Notice of—Order and disposition - - - - 872 *See* BANKRUPTCY. 2.

—— Building society—Part payment—Subrogation - - - - 298 *See* BUILDING SOCIETY. 2.

NEWSPAPER—Copyright—Selection of winning horse - - - - 29 *See* COPYRIGHT. 2.

NOTICE—Mortgage—Equitable interest—Original and derivative trust - 148 *See* MORTGAGE.

—— Proceedings on summons—Person out of the jurisdiction - - - 21 *See* PRACTICE. 13.

NUISANCE — Stagnation of air — Interference with ventilation - - - 389
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OFFICER—Company—Auditor - - 166
See Company. 17.

ONE-MAN COMPANY—Debentures—Debts of founder - - - - 617
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—— Liability of founder to indemnify company
See Company. 4. [323

ORDER AND DISPOSITION - 564, 872
See Bankruptcy. 1, 2.

ORDER BY CONSENT—Jurisdiction to set aside
See Practice. 5. [273

PART OF HOUSE—Taken by railway company
See Lands Clauses Act. 2. [571

PARTNERSHIP—*Interest of Deceased Partner in Assets—Annual Account—Death of Partner before actual taking of Account—Negotiations pending for Purchase of Partnership Property by Railway Company—Price ascertained after Death—Goodwill.*] Articles of partnership provided that an account should be taken on March 31 in each year of the assets and liabilities of the partnership, and of all dealings and transactions thereof during the then pending year, and a balance-sheet should be signed by the partners, and that, if any partner should die during the continuance of the partnership, the amount of his share and interest should be taken at the amount appearing as standing to his credit in the last annual balance-sheet which should have been signed previously to his death.—A partner died on April 10, 1891. At that time the partnership account for the year ending March 31, 1891, had not been taken. A railway company had, under their statutory powers, given notice to take part of the leasehold manufactory of the partnership, and had served on the partners a notice to treat. The partners had given a counter-notice, requiring the company to take the whole of the property. Negotiations as to the price to be paid had taken place.—On March 16, 1891, the partners sent a claim to the company for 22,470*l.*, which was made up of items for "leasehold interest," "plant," "goodwill," and "disturbance and removal." On April 8 the company offered 19,000*l.* in settlement of all claims; and on April 11 the solicitors of the partners wrote to the company's solicitors that their clients had instructed them to accept the offer of 19,000*l.* The letter mentioned the death of the partner. This arrangement was carried out by a formal agreement dated July 30, 1891.—At the trial of an action by the executor of the deceased partner against the surviving partners to ascertain the interest of the testator in the assets of the partnership, it was held ([1893] 1 Ch. 391) that the plaintiff was entitled to have the partnership accounts taken up to March 31, 1891, and to have the share of the testator ascertained by that account, and that the value of the leasehold factory as of that day should be included in the account. On taking the account the chief clerk apportioned the 19,000*l.* between the three items

PARTNERSHIP—*continued.*
of the claim made by the firm other than the item for disturbance and removal in proportion to the amounts claimed for those items respectively:—*Held*, that the plaintiff was entitled to have the amounts apportioned in respect of the leasehold interest and the plant brought into the account but not the amount apportioned in respect of the goodwill. Hunter *v.* Dowling 223

—— Accounts — Statute of Limitations—Concealed fraud - - - 474
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—— Solicitor — Breach of trust — Liability of partner - - - - 69
See Trustee. 2.

PATENT—*Practice—Costs—Particulars of Objections—Action not brought to Trial—Certificate—Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 29, *sub-s.* 6.] The operation of s. 29, sub-s. 6, of the Patents, Designs, and Trade Marks Act, 1883, is not confined to cases where the action is brought to trial.—In the absence (however arising) of a certificate under s. 29, sub-s. 6, the costs of particulars cannot be recovered under an order for payment of the costs of the action. Middleton *v.* Bradley - - - - - - 716

PAYMENT INTO COURT - - 711, 747
See Practice. 10, 11.

PENALTY—Tramway—Distress for non-repair of rails - - - - 508
See Tramway. 2.

PER CAPITA OR PER STIRPES—Children of nephews and nieces - - 196
See Will. 3.

PERPETUITY—Charitable gift—Yacht-racing
See Charity. 1. [649

—— Gift over of personal estate after failure of issue - - - - - 348
See Will. 1.

—— Gift to class—Invalidity as to some member of class - - - - 698
See Will. 10.

PHOTOGRAPH—Copyright - - - 531
See Copyright. 3.

PLEDGE—To person in possession of goods 415
See Principal and Agent.

POLICY OF INSURANCE—Life policy—Tenant and remainderman - - 738
See Tenant for Life and Remainderman. 3.

PORTION—Satisfaction of, by less amount 853
See Trustee. 2.

PRACTICE—*Attachment—Solicitor—Default in Payment of Money in Character of Officer of Court—Costs of Taxation of Bill—Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 4, *sub-s.* 4.] An order for the taxation of a solicitor's bill, the amount of which he had retained out of money belonging to his client, directed that, in case it should appear that the bill was overpaid, the solicitor should, within four days after service of the order and of the taxing master's certificate, repay to the client the amount certified to be overpaid. The costs of the taxation were reserved. The

PRACTICE—*continued.*

taxing master found that the bill had been overpaid. By a subsequent order it was directed that the solicitor should pay the taxed costs of the taxation of the bill:—*Held*, that the costs of the taxation, as well as the amount found due from the solicitor upon the taxation, were within the exception of sub-s. 4 of s. 4 of the Debtors Act, 1869, as being due from him "in his character of an officer of the Court," and that he could be attached for his default in payment of both. *In re* A Solicitor - - - 66

2. —— *Attachment—Solicitor—Non-payment of Money—Time given by Client—Part Payment by Solicitor—Waiver of right to enforce Attachment.*] After a writ of attachment had been issued at the instance of clients against a solicitor, for his non-payment of a sum of 78*l.* which he had been ordered to pay, the clients, at the request of the solicitor, agreed to suspend proceedings under the writ for fourteen days, upon the solicitor paying 25*l.* on account. This was done, but the solicitor did not make any further payment within the extended time, and he was arrested. Upon a motion by the solicitor for his discharge from custody:—*Held*, that, by giving time and accepting part payment, the clients had not waived their right to enforce the writ of attachment.—*Harvey* v. *Hall* (L. R. 16 Eq. 324) distinguished. *In re* Fereday - - 437

3. —— *Commercial Causes—Transfer to Commercial Court when ordered—Powers of Judge—Notice of Queen's Bench Division as to Commercial Causes*, 1895, *Rule* 6.] The judge charged with commercial business has no further power of dispensing with the technical rules of evidence than any other judge of the High Court, the power of so doing being that conferred by General Order xxx., r. 7, which has no special reference to the commercial court. Rule 6 of the Notice of the Queen's Bench Division in 1895 as to commercial causes does not purport to extend that power.—The object of the establishment of the commercial court was not that on the one hand all commercial causes or on the other hand only short causes should be tried there, but that causes should be so tried which are likely to be more speedily, economically, and satisfactorily tried if brought before a judge having special familiarity with mercantile transactions.—A cause will not be transferred from the Chancery Division to the Queen's Bench Division to be tried as a commercial cause merely because it is a commercial cause; but the Court will consider whether from its nature it is likely to be more speedily, economically, and satisfactorily tried by the commercial court. Baerlein *v.* Chartered Mercantile Bank - - - - C. A. 488

4. —— *Compromise—Client and Counsel—Mistake—Procedure—Evidence of Counsel, how given.*] Where, acting upon general instructions given by a client to his counsel to compromise a litigation, counsel consents to a compromise under a misapprehension, such as where, intending to concede one thing, he inadvertently concedes another, or where the counsel on both sides are not ad idem, neither the counsel nor the client is bound by the compromise, and the Court will set it aside.—*Holt* v. *Jesse* (3 Ch. D. 177) approved

PRACTICE—*continued.*

of.—Upon the question of the extent of the authority given by a client to his counsel to compromise litigation to which the client is a party, the Court will accept the statement of counsel if made from his place at the bar, without requiring it to be made on oath. Hickman *v.* Berens [C. A. 638

5. —— *Consent Order—Jurisdiction to Set Aside—Mistake—Mortgagor and Mortgagee.*] The Court has jurisdiction to set aside a consent order upon any ground which would invalidate an agreement between the parties.—A consent order which had been completed and acted upon, but without affecting interests of third parties, set aside by the Court upon the ground of common mistake.—*Gough* v. *Wood* ([1894] 1 Q. B. 713) explained. Huddersfield Banking Company, Limited *v.* Henry Lister & Son, Limited [C. A. 273

6. —— *Costs—Attendance of Witnesses—Rules of Supreme Court*, 1883, *Order* lxv., *r.* 27, *sub-rr.* 9, 37.] Allowances to witnesses for hotel expenses on attendance at the trial are in the discretion of the taxing master; and are not regulated by the scale of 1853. East Stonehouse Local Board *v.* Victoria Brewery Company - - - - - - 514

7. —— *Costs—Trustee's Costs—No Order made as to Costs—Right of Trustee to retain Costs out of Estate.*] A summons having been taken out by a beneficiary for the administration of a testator's estate under which several questions arose with respect to the accounts of the trustee and his management of the property, the judge made an order as to the questions in dispute, and ordered the accounts to be taken, and declared that "he did not think fit to make any order as to the costs of the action":—*Held*, that this declaration was a judicial decision that the trustee was not entitled to his costs in the action; and that he had no right to retain them out of the estate. *In re* Hodgkinson. Hodgkinson *v.* Hodgkinson [C. A. 190

8. —— *Garnishee Order—Money in the hands of the Sheriff—Judgment for Payment of Money into Court—Judgment for Payment of Money to a Person—Costs—"Debt or Liability"—Rules of Supreme Court*, 1883, *Order* lxii., *rr.* 3, 4; *Order* xlv., *r.* 1—*Bankruptcy Act*, 1890 (53 *&* 54 *Vict. c.* 71), *s.* 11, *sub-s.* 2—*Bankruptcy Act*, 1883 (46 *&* 47 *Vict. c.* 52), *s.* 30, *sub-s.* 1.] Where a sum of money has been ordered to be paid into court, a garnishee order cannot be made attaching a debt to answer the sum so ordered to be paid in.—Judgments or orders for payment of money into court are not within Order xlv., r. 1.—Apart from sub-s. 2 of s. 11 of the Bankruptcy Act, 1890, money in the hands of the sheriff can be attached by a garnishee order. The effect of the sub-section is to place a temporary stop on the money in the hands of the sheriff. The right of the execution creditor to the money is not a contingent right: it is a vested right, liable to be divested in the event of bankruptcy supervening within the fourteen days mentioned in the sub-section.—Costs incurred in an action relating to a fraudulent breach of trust are not a "debt or

PRACTICE—*continued.*

liability" within s. 30, sub-s. 1, of the Bankruptcy Act, 1883. *In re* GREER. NAPPER v. FANSHAWE [217

9. —— *Interrogatories—Sufficiency of Answers—Agents of Testator—Executor, how far bound to inquire.*] When a man is interrogated about acts done in the presence of persons employed by him, their knowledge is his knowledge, and he is, therefore, bound, in order to enable him to answer, to make inquiry of those persons; and the rule applies, not only where the persons so employed are servants or workmen, but also where they are bankers or solicitors.—But the rule was held not to apply to an executor interrogated as to whether trust funds alleged to have been received by his testator had been paid by the latter to his bankers or solicitors at a period twenty years prior to his death, inquiry as to the transactions of a testator at so remote a period not being one of the duties of an executor. ALLIOTT *v.* SMITH - - - - - 111

10. —— *Payment into Court on Motion—Admission by Defendant—Money received by Defendant but improperly paid away.*] Upon an interlocutory motion by the plaintiffs (second mortgagees) that the defendants (the first mortgagee and his solicitor) should be ordered to pay into court the balance of the proceeds of sale of the mortgaged property (which the solicitor admitted that he had received for his client), after deducting what was due in respect of the first mortgage, the solicitor claimed to retain also the amount of payments which he had made to the executors of the mortgagor:—*Held*, that though those payments were improper, yet, as the amount of them was not in the hands of the defendants, they could not be ordered to pay it into court upon an interlocutory motion, and they were ordered to pay only the balance of the sale moneys after deducting that amount and the amount due on the first mortgage.—*Neville* v. *Matthewman* ([1894] 3 Ch. 345) and *Nutter* v. *Holland* ([1894] 3 Ch. 408) considered. CROMPTON & EVANS' BANK *v.* BURTON - - - - 711

11. —— *Payment into Court—Admissions—Motion by some Plaintiffs only—Parties—Joinder—Discretion of Court in Orders on Admissions—Rules of Supreme Court*, 1883, *Orders* XVI., *rr.* 1, 11; XVIII., *r.* 6; XXXII., *r.* 6.] A motion under Order XXXII., r. 6, for an order against a defendant on admissions of fact must be made by all the plaintiffs in the action, and not merely by some of them.—Accordingly, where, in an action by a tenant for life and the reversioners under a settlement against the trustees to make good a breach of trust, the reversioners alone moved under the above rule for an order on one of the defendants to pay capital moneys into court on admissions, the Court refused to entertain the motion in the absence of the tenant for life.—The practice as to joinder of parties considered.—An order on admissions is not a matter of right, but is in the discretion of the Court. *In re* WRIGHT. KIRKE *v.* NORTH - - - - 747

12. —— *Production of Documents—Discovery—Fraud, Charge of—Solicitor and Client—Privilege—Inspection by Judge—Rules of Supreme Court*, 1883, *Order* XXXI., *r.* 19A, *sub-r.* 2.] Where

PRACTICE—*continued.*

fraud is alleged against a defendant, communications between himself and his solicitor as to the subject-matter of the alleged fraud are not privileged from production, there being no distinction in this respect between a crime and a civil fraud; and it is immaterial for this purpose whether the solicitor is or is not a party to the alleged fraud.—*Reg.* v. *Cox* (14 Q. B. D. 153) considered.—The practice as to inspection by the judge himself, under Order XXXI., r. 19A, sub-r. 2, of documents for which privilege is claimed, discussed. WILLIAMS *v.* QUEBRADA RAILWAY, LAND AND COPPER COMPANY - - - - - 751

13. —— *Service out of Jurisdiction—Originating Summons—Order—Notice—Jurisdiction—Rules of the Supreme Court*, 1883, *Order* XI.; *Order* XVI., *r.* 40; *Rules of the Supreme Court, November* 28, 1893, *r.* 7; *Rule of the Supreme Court, January* 10, 1894.] The Court cannot give leave to serve notice of an order made on an originating summons upon a person resident out of the jurisdiction. But in such a case the person having the conduct of the proceedings may of his own motion give notice, by letter or otherwise, to the person resident out of the jurisdiction; and if, after notice, that person does not choose to come in, the Court will act upon the order, and, where a fund in Court is in question, will distribute it, in his absence.—Decision of North J. affirmed.—*In re Gordon's Settlement Trusts* (W. N. (1887) 192) doubted. *In re* CLIFF. EDWARDS *v.* BROWN - - - - - C. A. 21

14. —— *Service out of Jurisdiction—Writ—Irregularity—Setting aside Service—Rules of Supreme Court*, 1883, *Order* XI., *rr.* 1, 4; *Order* II., *r.* 5; *Order* LXX., *r.* 1; *Appendix A, Part I., Form No.* 5.] A writ was issued against and served upon a sole defendant, who was within the jurisdiction. He applied for leave to issue a third party notice against D., who was out of the jurisdiction. On the hearing of this application the judge directed that D. should be added as a defendant, and gave the plaintiff leave to add D. and to amend the writ, and to serve the amended writ upon D. out of the jurisdiction. No affidavit had been made, as required by rule 4 of Order XI., that the plaintiff had a good cause of action, &c. The amended writ was served on D. out of the jurisdiction, but it did not bear the indorsement, prescribed by Form No. 5 in Appendix A to the Rules of the Supreme Court, for a writ to be served out of the jurisdiction:—*Held*, that these omissions were mere irregularities and not matters of substance, and that they did not entitle D. to have the amended writ and the service thereof upon him set aside. DICKSON *v.* LAW AND DAVIDSON - - - - - - - 62

15. —— *Service of Writ—Jurisdiction—Scottish Defendant—Person carrying on Business within the Jurisdiction in Name or Style other than his own Name—Service of Writ—Rules of Supreme Court*, 1883, *Order* XLVIII.A, *rr.* 3, 11.] Rule 11 of Order XLVIII.A provides that "any person carrying on business within the jurisdiction in a name or style other than his own name may be sued in such name or style as if it were a firm name; and, so far as the nature of the case will permit, all rules relating to proceedings

PRACTICE—*continued.*
against firms shall apply." B., a domiciled Scotsman, resident in Scotland, carried on business in Liverpool in the name of G. & J. Burns:—*Held*, that this rule did not apply so as to enable the plaintiff to effect service of a writ upon B. by serving it on the person having the management and control of the business at Liverpool. MacIver *v.* G. & J. Burns - - - **C. A. 630**

16. —— *Suspension of Injunction—Appeal—Extension of Time—Court to which Application should be made.*] A judgment directing an inquiry as to damages on account of a nuisance was varied by the Court of Appeal, who granted an injunction, but suspended its operation for a certain time:—*Held*, that an application for its further suspension might be made to and disposed of by the judge to whose Court the action was attached. Shelfer *v.* City of London Electric Lighting Company. Meux's Brewery Company *v.* The Same - - - - **C. A. 388**

—— Adding parties—Bankruptcy—Lunatic **730**
See Lunatic. 2.

—— Lunacy—Percentage on income - **12**
See Lunatic. 3.

—— Patent—Particulars of objections—Costs
See Patent. [**716**

PRECATORY TRUST - - - **370**
See Will. 9.

PREFERENCE SHAREHOLDER — Undrawn profits before liquidation - - **265**
See Company. 20.

PRESCRIPTION—Light - - - **708**
See Light. 2.

PRINCIPAL AND AGENT—*Pledge to Person in Possession—Sale of Goods Act*, 1893 (56 & 57 *Vict. c.* 71), *s.* 25, *sub-s.* 1.] A merchant sold wine stored in the cellars of a warehouseman, and afterwards pledged the wine to the warehouseman for advances made in good faith without notice of the sale:—*Held*, that the pledge conferred no title to the wine. Nicholson *v.* Harper [**415**

PRIORITY—Mortgages — Equitable interests—Notice - - - - **148**
See Mortgage.

PRIVILEGE—Production of documents - **751**
See Practice. 12.

PRODUCTION OF DOCUMENTS—Privilege **751**
See Practice. 12.

PROFITS—Company—Earned before liquidation —Preference shareholders - **265**
See Company. 20.

RAILWAY—*Accommodation Work—Level Crossing for Accommodation of Intersected Lands—Severance of Ownership—Abandonment of Easement—Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *s.* 68.] A line of railway was made through the land of R., and pursuant to an award a level crossing was provided under the Railways Clauses Consolidation Act, 1845, s. 68, as an accommodation work, and by the conveyance to the company a right of way over it was reserved to R. and his successors in title, and the company

RAILWAY—*continued.*
covenanted to maintain it. Afterwards R. sold and conveyed his land on one side of the railway to P., not mentioning the crossing, and not giving P. any right of way over the land retained, nor reserving any right of way over the land sold. Afterwards the land retained by R. was sold to G., who insisted on his right to use the crossing:—*Held*, by the Court of Appeal, affirming the decision of Wright J., that after the conveyance to P. there was no right to use the crossing, and that the company were at liberty to stop it:—*Held*, further, that the right to the crossing was finally abandoned by the conveyance to P., and would not be revived if the lands on the two sides of the railway should again become vested in the same person. Midland Railway Company *v.* Gribble - - - - **129, C. A. 827**

RECEIVER—Debenture-holder—Tramway Company - - - - - **36**
See Tramway. 1

—— Manager—Winding up of company—Right to indemnity—Priority - - **1**
See Company. 21.

—— Mortgagee—Mortgage of book debts **872**
See Bankruptcy. 2.

REDUCTION OF CAPITAL—Company - **127,** [**454, 726, 860**
See Company. 9, 10, 11, 12.

REGISTER—Shareholders—Rectification **768**
See Company. 13.

REGISTRATION—Design - - - **593**
See Copyright. 1

—— Shares—Power to refuse - - **404**
See Company. 7.

—— Trade-mark - - - - **176**
See Trade-mark.

REMOTENESS—Gift over of personal estate after failure of issue - - - **348**
See Will. 1.

—— Gift to class—Invalidity as to some members of class - - - - **698**
See Will. 10.

REPAIRS — Settled Land Acts — Payment by tenant for life - - - **468**
See Settled Land Acts. 2.

REPUTED OWNERSHIP - - - **564**
See Bankruptcy. 1.

REVENUE—*Legacy Duty—Annuity out of Rents of Realty—Trust for Accumulation of Surplus Rents—Annuitant Tenant for Life subject thereto—Legacy Duty Act*, 1845 (8 & 9 *Vict. c.* 76), *s.* 4.] A testator devised real estate to trustees for a term of 500 years, and subject thereto on limitations under which A. became tenant for life. The trusts of the term were to raise and pay out of the rents and profits of the estate an annuity to the person who should (subject to the term) be entitled to the rents and profits; and the testator declared that, subject thereto, the trustees should during twenty-one years from the testator's death accumulate the rents and profits and invest them in land to be settled to the same uses; and, after the determination of the twenty-one years, should pay the rents and profits to the person for the

REVENUE—*continued.*
time being entitled to the hereditaments comprised in the term:—*Held*, that as A., during the period of twenty-one years, had in effect a mere charge upon the estate of another person, legacy duty, and not succession duty, was payable on the annuity. *Attorney-General* v. *Jackson* (2 Cr. & J. 101) and *Shirley* v. *Earl Ferrers* (1 Ph. 167) considered. *In re* De Hoghton. De Hoghton *v.* De Hoghton - - - - - 517

2. —— *Legacy Duty—Personal Estate directed to be laid out in Land—Tenant for Life—Reversion of Legatee on his own Death—Defeasible Interest—"Began to enjoy benefit"—Legacy Duty Act*, 1796 (36 *Geo.* 3, *c.* 52), *ss.* 12, 19—*Customs and Inland Revenue Act*, 1881 (44 *&* 45 *Vict. c.* 12), *s.* 41.] T., who died in 1854, devised his real estate, in the events which happened, to the use of B. for life, with remainder to the use of his first and other sons in tail male, with remainder to the use of B. in fee: and the testator bequeathed his residuary personal estate to trustees in trust for sale and to invest the proceeds in the purchase of land to be settled to the like uses, the income of the proceeds until such investment being payable in the same manner as the rents and profits of the land when purchased. In 1864 B. became tenant for life, and legacy duty was paid at 1 per cent. on his life interest in the residuary personal estate not invested in the purchase of land. In 1893 B. died without male issue, having by his will declared that all money liable to be laid out in land under T.'s will, and to which he, B., should be absolutely entitled in default of male issue, should be considered as part of his personal estate. Under the Customs and Inland Revenue Act, 1881, B.'s executors paid affidavit duty at 3 per cent. on his personal estate (including the residuary personal estate subject to the trusts of T.'s will and not yet laid out in land), after deduction for B.'s debts:—*Held*, that, at the moment of his death without male issue, B. "began to enjoy the benefit" of the capital of T.'s then subsisting residuary personal estate, within the meaning of s. 12 of the Legacy Duty Act, 36 Geo. 3, c. 52; and that, therefore, on his death legacy duty at 1 per cent. became, by that section and s. 19, payable under T.'s will on such capital, notwithstanding the affidavit duty already paid on B.'s estate. *In re Haygarth's Trusts* (22 Ch. D. 545) distinguished. Lord Kenlis *v.* Hodgson - - - 458

REVERSION—Charge on—Judgment debt 411
See Judgment.

—— Interest on—Apportionment between tenant for life and remainderman - 537
See Tenant for Life and Remainderman. 1.

—— Married woman—Covenant to release—Election - - - - 419
See Husband and Wife.

—— Vesting in legatee on his own death—Legacy duty - - - 458
See Revenue. 2.

RULES AS TO COMMERCIAL CAUSES, 1895, r. 6 - - - - - 488
See Practice. 3.

RULES IN LUNACY, 1892, r. 126 - - 12
See Lunatic. 3.

RULES IN WINDING-UP, March 21, 1868, rr. 6, 14 - - - - - - 726
See Company. 12.

—— **1892, rr. 11, 32** - - - - 545
See Company. 19.

RULES OF SUPREME COURT, Order II., r. 5
See Practice. 14. [62

—— **Order XI., rr. 1, 4** - - 21, 62
See Practice. 13, 14.

—— **Order XVI., rr. 1, 11** - - - 747
See Practice. 11.

—— **Order XVI., r. 17** - - - 730
See Lunatic. 2.

—— **Order XVI., r. 40** - - - 21
See Practice. 13.

—— **Order XVIII., r. 6** - - - 747
See Practice. 11

—— **Order XXV., r. 4** - - - 730
See Lunatic. 2.

—— **Order XXX., r. 7** - - - 488
See Practice. 3.

—— **Order XXXI., r. 19 A, sub-r. 2** - 751
See Practice. 12.

—— **Order XXXII., r. 6** - - - 747
See Practice. 11.

—— **Order XLII., rr. 3, 4** - - - 217
See Practice. 8.

—— **Order XLV., r. 1** - - - 217
See Practice. 8.

—— **Order LXV., r. 27, sub-rr. 9, 37** - 514
See Practice. 6.

—— **Order XLVIII. A, rr. 3, 11** - - 630
See Practice. 15.

—— **Order LXX., r. 1** - - - 62
See Practice. 14.

—— **App. A, Part I., Form 5** - - 62
See Practice. 14.

—— **Nov. 1893, r. 7** - - - - 21
See Practice. 13.

—— **Jan. 1894** - - - - 21
See Practice. 13.

RULES UNDER SOLICITORS' REMUNERATION ACT, Sched. I., Part I., r. 11 - 136
See Solicitor. 3.

—— **r. 2 (a), Sched. I., Part I.** - - 786
See Solicitor. 2.

SCALE CHARGE - - - 136, 786
See Solicitor. 2, 3.

SERVICE—Out of the jurisdiction - 21, 62
See Practice. 13, 14.

—— Writ—Defendant carrying on business in England in another name - 630
See Practice. 15.

SETTLED LAND ACTS—*Capital Moneys in the hands of Trustees—Direction as to Investment by Tenant for Life*—45 *&* 46 *Vict. c.* 38, *ss.* 21, 22, *sub-s.* 2; *s.* 53.] The exercise in good faith of the power of direction as to the investment or other application of capital moneys in the hands of the trustees given to the tenant for life by

SETTLED LAND ACTS—*continued.*
sub-s. 2 of s. 22 of the Settled Land Act, 1882, cannot be controlled by the trustees or by the Court. *In re* LORD COLERIDGE'S SETTLEMENT **704**

2. —— *Improvements executed without Scheme — Payment by Tenant for Life—Reimbursement out of Capital Moneys—Jurisdiction—Repairs—Sanitary Arrangements—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 21, 25, 26—*Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69), *ss.* 13, 15.] Under s. 15 of the Settled Land Act, 1890, the Court has jurisdiction to sanction the application of capital moneys in repaying to a tenant for life the expenses of improvements on the settled estate executed and paid for by him without the submission of a scheme. But in exercising such jurisdiction the Court will take care that no expenses shall be thrown upon capital, which as between tenant for life and remainderman ought in fairness to be paid out of income.—The costs of works which are not permanent improvements likely to benefit the remainderman more than the tenant for life, but are mere repairs or works incidental to the ordinary use, occupation, and enjoyment of the property, ought not to be allowed out of capital moneys arising under the Settled Land Acts.—The cost of additions to and alterations in the drainage and sanitary arrangements of a mansion-house *held* to fall within this principle. *In re* TUCKER'S SETTLED ESTATES [**C. A. 468**

SETTLEMENT — *Post-nuptial — Valuable Consideration—Covenant to settle after-acquired Property.*] A post-nuptial settlement made in order to avoid proceedings for contempt being taken against the husband, who had married a ward of Court without leave, contained a covenant to settle the wife's after-acquired property and a covenant by the husband to pay the premiums on a policy of assurance which he had assigned to the trustees of the settlement:—*Held*, that there was sufficient consideration for the covenant to settle the wife's property, and that it was capable of being enforced by the Court. STEPHENS *v.* GREEN. GREEN *v.* KNIGHT - - **C. A. 148**

SEVERANCE—Railway—Level crossing
See RAILWAY. [**129, 827**

SHARES—Founders' shares—Extinguishment of —Reduction of capital - - **860**
See COMPANY. 11.

—— Paid up—Registration of contract **759, 768**
See COMPANY. 13, 14.

—— Registration—Power to refuse - **404**
See COMPANY. 7.

SHERIFF — Money in hands of — Garnishee order - - - - **217**
See PRACTICE. 8.

SOLICITOR—*Bill of Costs*—"*Agreement in Writing*" — *Signature by Client only* — *Business in Police Magistrate's Court and at Quarter Sessions* —*Jurisdiction of High Court to set aside Agreement—Attorneys and Solicitors Act*, 1870 (33 & 34 *Vict. c.* 28), *ss.* 4, 8, 10, 15.] A document purporting to be an agreement as to the payment of costs between a solicitor and his client may be "an agreement in writing" within s. 4 of the Attorneys and Solicitos Act, 1870, even though

SOLICITOR—*continued.*
signed by the client alone.—*In re Thompson* ([1894] 1 Q. B. 462) followed. Costs relating to business done by a solicitor in the court of a police magistrate, or in a Court of Quarter Sessions, are subject to taxation in the usual way; and an agreement as to the amount of such costs may be examined into, and, if necessary, be set aside by a judge of the High Court. —The expressions "the Court" or "a judge" in ss. 8 and 10 of the Act of 1870 do not include a Court of Quarter Sessions or a police magistrate's court, or the justices constituting such Courts, but refer to Courts in which actions at law or suits in equity can be brought, and to judges who have power to try such actions or suits. *In re* JONES - - - - - **719**

2. —— *Bill of Costs—Scale Fee—Company—Debenture Trust Deed—Non-issue of Debentures—"Mortgage"—"Completed Mortgage"—General Order under Solicitors' Remuneration Act*, 1881, *r.* 2 (*a*), *Sched. I., Part I.*] A trust or covering deed was executed by a limited company to trustees in the usual form for securing debentures intended to be issued to a certain amount; but the debentures were never issued, and the deed therefore became inoperative:—*Held* (reversing the decision of Kekewich J.), that the covering deed so executed was not a completed mortgage within rule 2 (*a*) and Part I. of Sched. I. to the General Order under the Solicitors' Remuneration Act, 1881, and therefore that the solicitor to the trustees was not entitled to charge a scale fee for "preparing and completing mortgage" under that rule.—Whether, if the deed had become operative by the issue of the debentures, it would have been a "mortgage" within the rule, *quære*. —Whether a mortgage for future advances is a completed mortgage within the rule, *quære*. *In re* BIRCHAM - - - - **C. A. 786**

3. —— *Bill of Costs—Scale Fee — General Order under Solicitors' Remuneration Act*, 1881, *Sched. I., Part. I., r.* 11—*Sale of Land by Agreement—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 175, 176.] The exception contained in rule 11 of Sched. I., Part I., of the General Order under the Solicitors' Remuneration Act, 1881, whereby the scale charge is made inapplicable to sales of land under the Lands Clauses Act, or any other Act under which the vendor's charges are paid by the purchaser, extends to purchase by agreement by a public body under the powers of such an Act, although the vendor is absolute owner, and although the agreement contains a special clause stipulating that the purchasers shall bear all the vendor's costs as between solicitor and client.—A voluntary purchase by a local authority under the powers of the Public Health Act, 1875, which incorporates the Lands Clauses Act, *held* to be within the rule.—The decision of Kekewich J. affirmed. *In re* BURDEKIN - - - - - **C. A. 136**

4. —— *Bill of Costs—Taxation on Solicitor's Application—Amount found due from Client—Mode of enforcing Payment.*] When in the Chancery Division the common order for the taxation of a solicitor's bill of costs is made on his own application (the order containing no direction for payment by the client), and the

SOLICITOR—*continued.*
taxing master certifies that a balance is due from the client, the solicitor cannot enforce payment of the balance by summons, but must proceed by action against the client. *In re* Debenham & Walker - - - - - - 430
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SPECIFIC PERFORMANCE—*Defence to—Agreement for Compromise—Silence as to Material Fact.*] Shortly before an interview between the plaintiff's solicitor F., the defendant, and his solicitors, to arrange for the compromise of an action, F. received a telegram informing him of the result of certain proceedings in the action favourable to the defendant, but did not disclose his information before the terms of compromise were agreed. The defendant claimed that the agreement was no longer binding, on the ground that a material fact had been suppressed:—*Held*, that there being no obligation on F. to disclose all he knew, the defendant was bound by the terms of the settlement.—Mere silence as regards a material fact, which the one party is not bound to disclose to the other, is not a ground for rescission, or a defence to specific performance.—*Ellard* v. *Lord Llandaff* (1 Ball & B. 241; 12 R. R. 22) considered. Turner *v.* Green 205
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26 & 27 Vict. c. 118, ss. 22, 24—*Companies Clauses* - - - - - 287
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37 & 38 Vict. c. 57, s. 8—*Real Property Limitation* - - - - 100, 820
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51 & 52 Vict. c. 50, s. 10—*Patents, Designs, and Trade-marks* - - - 176
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51 & 52 Vict. c. 59, ss. 6, 8—*Trustees* - 69
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53 & 54 Vict. c. 62—*Companies, Memorandum of Association* - - - 127
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53 & 54 Vict. c. 69, ss. 13, 15—*Settled Land Act* - - - - - 468
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53 & 54 Vict. c. 71, s. 1—*Bankruptcy* - 799
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56 & 57 Vict. c. 53, ss. 35, 38—*Trustees* 483
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See Lands Clauses Act. 1.

TENANT FOR LIFE—Settled Land Act—Repairs—Reimbursement - - - 468
See Settled Land Acts. 2.

TENANT FOR LIFE AND REMAINDERMAN — *Capital and Income—Apportionment—Interest—Rate of — Reversion.*] In future, in applying the rule in *In re Earl of Chesterfield's Trusts* (24 Ch. D. 643) as to the apportionment as between capital and income of the amount of an unconverted reversionary interest which has fallen in, interest at 3, instead of at 4, per cent. ought to be adopted as the basis of calculation.—So *held* in a case where the reversion in question formed part of the estate of a testator who died in 1854. *In re* Goodenough. Marland *v.* Williams 537

2. —— *Capital and Income—Apportionment—Money paid under erroneous Order of Court—Rate of Interest.*] Where money forming part of the residuary estate of a testator was paid away under an erroneous order of the Court, and subsequently, on the order being varied on appeal, was recovered, but without interest:—*Held*, that the money so recovered ought not to be treated as consisting of capital only, but that a fair proportion of it ought to be paid to the tenant for life of the residue as income, according to the principle of *Turner* v. *Newport* (2 Ph. 14):—*Held*, however, that in a plying that principle interest ought to be calculated at the rate of 3 per cent., instead of 4, as being more agreeable to the facts of present experience. *In re* Duke of Cleveland's Estate. Hay *v.* Wolmer - - - - 542

3. —— *Capital and Income—Apportionment—Life Policy—Premiums—Mortgage Debt—Adjustment of Liability for Premiums and Interest.*] Part of a testator's estate consisted of policies on the life of another, subject to a mortgage to the life assurance office. By his will he bequeathed his personal estate to one for life with remainders over. After the death of the testator his executor paid the premiums on the policies and the interest on the mortgage out of the income of the personal estate until the death of the assured, when the office paid to the executor the surplus of the policy moneys remaining after deducting the mortgage debt:—*Held*, that, as between the tenant for life and the remaindermen, the amount of income expended in keeping down the premiums and interest ought to be recouped to the tenant for life, with interest at 4 per cent., out of the property preserved by the expenditure—that is, the surplus policy moneys; and that the balance of such surplus moneys must be apportioned between capital and income according to the principle and form of order in *In re Earl of Chesterfield's Trusts* (24 Ch. D. 643). *In re* Morley. Morley *v.* Haig - - - - 738

TIME—Extension of—Suspension of injunction—Order by Court of Appeal - 388
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TRADE-MARK — *Capacity for Registration — Fancy Word — Invented Word — Reference to Quality of Goods—Geographical Name—Patents, Designs, and Trade Marks Acts*, 1883 *and* 1888 (46 *&* 47 *Vict. c.* 57, *s.* 64; 51 *&* 52 *Vict. c.* 50, *s.* 10).]

TRADE-MARK—*continued.*

A tea-dealer registered the word "Mazawattee" as a trade-mark for tea and other articles of food under the Patents, Designs, and Trade Marks Acts, 1883 and 1888. The tea was mostly imported from Ceylon, and the word registered was compounded of "maza," which means relish in Hindustani, and "wattee," which means an estate in Cingalese; but the compound word had no meaning in either language. There was no estate in Ceylon named "Mazawattee":—*Held*, on an application to expunge the trade-mark, that the word "Mazawattee" was a good trade-mark, being a fancy word under the Patents, Designs, and Trade Marks Act of 1883, and an invented word under the Act of 1888, having no reference to the quality of the goods, and not being a geographical name.—The decision of Romer J. affirmed. *In re* Densham's Trade-mark - - **C. A. 176**

TRADING COMPANY—Depreciation of assets—Payment of dividend - - **245**
See Company. 8.

TRAMWAY—*Debenture-holder—Default of Company—Appointment of Manager—Sale of Undertaking—Tramways Act*, 1870 (33 & 34 *Vict. c.* 78), *s.* 44.] The holders of debentures issued by a tramway company governed by the Tramways Act, 1870 (whether the company be incorporated under the Companies Act, 1862, or by a special Act), by which debentures the undertaking of the company and all its property present and future, including uncalled capital, are charged, are, in the event of default by the company, entitled only to the appointment of a receiver of the undertaking of the company and the net earnings thereof; they are not entitled to an order for the sale of the undertaking, or to the appointment of a manager.—*Bartlett* v. *West Metropolitan Tramways Co.* ([1893] 3 Ch. 437; [1894] 2 Ch. 286) disapproved.—*Per* Kekewich J.:—Plaintiffs suing on behalf of a class should specify that class as accurately as possible. For instance, where, in an action brought by a debenture-holder suing on behalf of himself and all other the holders of debentures in a limited company which had been dissolved and reincorporated by a special Act under the name of the defendant company, the plaintiff was described in the title of the action as suing "on behalf of himself and other the holders of the debentures of the defendant company and its predecessors in title":—*Held*, that this description was too vague and required amendment. Marshall *v.* South Staffordshire Tramways Company - - - **C. A. 36**

2. —— *Public Undertaking—Penalty—Distress—Tramways Act*, 1870 (33 & 34 *Vict. c.* 78), *ss.* 28, 56.] The principle of *Gardner* v. *London, Chatham and Dover Ry. Co.* (L. R. 2 Ch. 201) does not prevent the levying by distress of penalties imposed on a tramway company for non-repair of their rails. Pegge *v.* Neath District Tramways Company - - - - **508**

TRUST FOR SALE—Power to postpone sale—Power to carry on business - - **56**
See Executor. 2.

TRUSTEE—*Breach of Trust—Following Trust Funds—Satisfaction—Portion.*] Part of the proceeds of trust funds appropriated by a father were made subject to the marriage settlement of his son, a beneficiary in remainder, who was ignorant of the source of the settled property:—*Held*, that the son's representatives were only entitled to have his share of the trust funds replaced after deducting the value of the proceeds settled.—A debt due from a father to a son is not satisfied, in whole or in part, by a gift of less amount, or contingent, or uncertain in nature.—The reversionary interest of a beneficiary under the marriage settlement of his father in funds that came to the hands of the father, *held*, not to be a portion so as to be satisfied pro tanto by a payment from the father of less amount. Crichton *v.* Crichton **[853**

2. —— *Breach of Trust—Statute of Limitations—Consent of Tenant for Life—Impounding Life Interest—Solicitor Party to Breach of Trust—Liability of Partner—Trustee Act*, 1888 (51 & 52 *Vict. c.* 59), *ss.* 6, 8—*Trustee Act*, 1893 (56 & 57 *Vict. c.* 53), *s.* 45.] By a marriage settlement made in 1875, money of the wife was vested in trustees upon trust to pay the income to her during the joint lives of herself and her husband for her separate use without power of anticipation, and after her death, in case he should survive her, to pay the income to him during his life, and after the death of the survivor to hold the trust funds upon trust for the children of the marriage. No express life estate was given to the wife in case she should survive her husband.—The husband died in 1885, and in 1890 the wife and her infant children commenced an action for breaches of trust committed in 1884, to which the defendants set up the defence of the Statute of Limitations under *s.* 8, sub-*s.* 1 (*b*), of the Trustee Act, 1888:—*Held*, that the wife took by resulting trust an estate for her life in remainder, which was a different estate from the estate for the joint lives limited to her by the settlement; that the life estate did not become an interest in possession until the death of the husband; and that, consequently, the statute did not begin to run against the wife till then, and was not a bar to her action.—The settlement empowered the trustees to vary the investments of the trust funds, with the consent in writing of the wife during her life. It having been arranged that the original trustees of the settlement should retire, and new trustees be appointed, one of the old trustees took to the securities on which the trust funds were invested, and paid the moneys into a bank to an account opened in the joint names of himself and one of the proposed new trustees. The moneys afterwards came into the hands of a solicitor, who was acting for the husband and wife and the proposed new trustees, and he, before the appointment of the new trustees had been made, and without any communication with the old trustees, advanced the moneys upon mortgages of building land in the names of the proposed new trustees. The mortgages were, as the Court held, improper securities for trust funds, and they resulted in a loss. After the mortgages had been made, a deed appointing the new trustees was executed by the husband and wife, and in this deed the mortgages were referred to as constituting securities for the trust

TRUSTEE—*continued.*

funds. The wife consented in writing to two of the mortgages, but there was nothing to shew that she knew that they constituted a breach of trust.—The wife and her infant children brought an action against the solicitor and his partner to compel them to make good the loss occasioned by the improper investment of the trust moneys:—*Held*, that the solicitor was liable, as if he had actually been a trustee of the settlement, to make good the loss:—*Held*, also, that, having regard to the evidence, the solicitor was in making the advances acting on behalf of his firm, and that the defendants were jointly and severally liable to make good the loss:—*Held*, further, that the life estate of the wife could not be impounded, under s. 6 of the Trustee Act, 1888, or s. 45 of the Trustee Act, 1893, by way of indemnity to the defendants. MARA *v.* BROWNE - - 69

3. —— *Refusal to transfer Stock on Request—Petition—Vesting Order—Costs against Trustee—Trustee Act*, 1893 (56 & 57 *Vict. c.* 53), *ss.* 35, *sub-s.* 1 (*ii.*), (*d*), 38.] Trustees who held a residuary estate upon trust, in events which had happened, to divide the same amongst three sets of beneficiaries, were requested in writing by all such beneficiaries to transfer to them the various funds of which the residue consisted according to an arrangement which they had entered into. It appeared that there was sufficient cash in the hands of the trustees to pay any outstanding costs which they might have to pay, but one of the two trustees refused to transfer for twenty-eight days after the request.—Kekewich J. *held* (see [1895] 1 Ch. 538, 542), that there was no justification for the trustee's refusal, and made a vesting order against him under s. 35 of the Trustee Act, 1893, ordering him to pay the costs of the application upon the ground that it was the result of his own obstinacy:—*Held*, by the Court of Appeal, that the Court had jurisdiction to make the vesting order, and to order the recusant trustee to pay the costs of the application.—Appeal dismissed with costs. *In re* KNOX'S TRUSTS - - - - - C. A. 483

—— Banking account—Application of payments *See* BANKER. [433

—— Costs—No order made as to—Right to retain - - - - 190
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TRUSTEE IN BANKRUPTCY—Bankrupt lunatic—Action by committee - - 730
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UNDISCHARGED BANKRUPT—After-acquired property - - - - 212
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VENDOR AND PURCHASER—*Conditions of Sale—Condition restricting Objections to Title—Bad Title shewn Aliunde—Return of Deposit refused, but Specific Performance also refused.*] A purchaser bought property under a strict condition of sale that he should not make any objection as to the intermediate title between a certain lease and the assignment of it, but should assume that the assignment vested a good title in the assignees.—It was afterwards discovered by the purchaser that there was a vital defect in the intermediate title, and that the assignees had no title to the property;—*Held*, (1.) (reversing the decision of Kekewich J.), that the purchaser was bound at law by the condition, and therefore could not recover his deposit; but (2.) (affirming the decision of Kekewich J.) (dubitante Lopes L.J.) that as the vendor could not give a holding title to the purchaser, the Court would, in the exercise of its discretion, refuse to decree specific performance of the contract, and would leave the parties to their remedies at law. *In re* SCOTT AND ALVAREZ'S CONTRACT. SCOTT *v.* ALVAREZ - - - - C. A. 603

2. —— *Contract—Memorandum—Preparation of formal Contract—Condition precedent—Waiver of Condition.*] A vendor and purchaser signed a memorandum purporting to be an agreement for the sale and purchase of a house at a stated price, "subject to the preparation by the vendor's solicitor and completion of a formal contract":—*Held*, that the vendor could not waive that stipulation as being intended for his benefit alone, so as to constitute the rest of the memorandum a final contract enforceable against the purchaser. —*Hawksley* v. *Outram* ([1892] 3 Ch. 359) distinguished. LLOYD *v.* NOWELL - - 744

3. —— *Gavelkind Land—Infant Customary Heir—Enfeoffment—Insufficient Consideration—Title.*] A vendor furnished to the purchaser as part of his title to gavelkind lands certain customary feoffments with livery of seisin made to him when he purchased the property by infant co-heirs in gavelkind at the age of fifteen. It appeared on the face of the title that the purchase-money paid by him to the infants was not the full value of their shares, and that they were still under twenty-one:—*Held*, that the title could not be forced upon the purchaser. *In re* MASKELL AND GOLDFINCH'S CONTRACT - 525

4. —— *Discharge of Incumbrances on Sale—Question of Construction as to Interests in Futuro—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 5.] Upon an application to the Court under s. 5 of the Conveyancing and Law of Property Act, 1881, to make provision for incumbrances on land, and the sale of the land freed therefrom, the Court will decide a question of construction involving the determination of interests in futuro, if the decision of such question is necessary in order to ascertain what sum of money ought to be set aside to answer the incumbrances. *In re* FREME'S CONTRACT - 256

VESTING ORDER—Trustee refusing to transfer fund - - - - - 483
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VICTORIA—Law of—Lunatic—Vesting of property in England - - - 666
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VOLUNTARY SETTLEMENT—Covenant to settle after-acquired property—Valuable consideration - - - - 148
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—— Void against trustee in bankruptcy—Lunatic bankrupt - - - - 799
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WILL—*Application to Personal Estate of Limitations framed by mistake as for Real Estate—Repugnancy—Lapse—Perpetuity—Gift Over of Personal Estate after Failure of Issue—Intermediate Income of Legacy—Woman past Childbearing.*] When there are in a will successive limitations of personal estate in favour of several persons absolutely, the first of those persons who survives the testator takes absolutely, although he would have taken nothing if any previous legatee had survived and had taken: the effect of the failure of an earlier gift being to accelerate, not to destroy, the later gift.—Application of this principle to successive limitations, in the forms properly applicable to real estate, of property erroneously supposed by the testator to be unconverted, but in fact converted into personalty. —Dictum of Knight Bruce V.-C. in *Harris* v. *Davis* (1 Coll. 416, 424) dissented from.—A testator, who under a settlement was absolutely entitled (subject to a life estate) to a moiety of the proceeds of a certain real estate under a trust for sale, by his will devised that real estate by its proper description (reciting that he was seised or possessed of it by virtue of the settlement, subject to the life estate), together with certain real estate of his own, to trustees, to the use of H. for life, with remainder to trustees to preserve the contingent remainders, with remainder to the use of the first and other sons of H. successively in tail male, with remainder to the use of the first and other sons of his niece E. successively in tail male, with remainder to the use of the first and other sons of his niece M. successively in tail male, with remainder to the use of the first and other sons of his niece F. successively in tail male, with remainders over.—H. survived the testator and died a bachelor. M. also survived the testator and died unmarried. E. was still alive but unmarried, and seventy years of age. F. had two sons, the eldest of whom died before the testator:—*Held*, first, that the testator's moiety of the proceeds of sale passed under the devise of the land.—Secondly, that there was no lapse by reason of the death of the first son of F. before the testator, and that the second son of F. took the moiety of the proceeds of sale absolutely at the death of the testator, subject to the contingency of E. having a son.—Thirdly, that the gift to the second son of F. on failure of issue of the first son was not void under the rule against perpetuities, because the estate, by the terms of the gift, must vest, if at all, in the lifetime of a person living at the death of the testator.—Fourthly, that, E. being now past child-bearing, the second son of F. was entitled to the intermediate income since the death of the tenant for life.—The decision of Kekewich J. reversed. *In re* Lowman. Devenish *v.* Pester C. A. 348

WILL—*continued.*

2. —— *Conditions—Life Interest—Forfeiture—"Liable to be deprived"—Commission of Act of Bankruptcy—Dismissal of Bankruptcy Petition.*] H. was entitled in reversion to a life interest in certain property subject to forfeiture if he should do or suffer anything whereby he would "be deprived or be liable to be deprived" of the beneficial enjoyment thereof. Before his interest fell into possession he committed an act of bankruptcy upon which a bankruptcy petition was presented against him. After his interest fell into possession the petition was dismissed; but before the dismissal the trustees of the property had funds in their hands representing income which, but for the bankruptcy proceedings, might have been paid to him:—*Held*, that a forfeiture had occurred.—*White* v. *Chitty* (L. R. 1 Eq. 372) and *Samuel* v. *Samuel* (12 Ch. D. 152) considered. *In re* Loftus-Otway. Otway *v.* Otway - 235

3. —— *Gift per Stirpes or per Capita.*] A testator gave real and personal estate to his wife for her life, and directed that after her death the income should be equally divided between his brother and sisters therein named, "at the decease of either of my before-named brother or sisters their interest herein to be equally divided amongst their children, and after the decease of all I desire the whole of my property to be sold, moneys called in, &c. &c., and to be equally divided between the children of the aforesaid share and share alike":—*Held*, by Stirling J., following *Brett* v. *Horton* (4 Beav. 239), that the division of capital among the nephews and nieces must be per stirpes:—*Held*, by the Court of Appeal, that the ultimate gift to the nephews and nieces was a clear gift per capita, and could not be controlled by the fact that so long as any brother or sister of the testator was living the income was divisible per stirpes. *In re* Stone. Baker *v.* Stone - - - C. A. 196

4. —— *Heirlooms—Trust for Person entitled to "actual" possession of Realty.*] Chattels bequeathed as heirlooms upon trust to go along with, and be enjoyed by the person for the time being entitled under a settlement to the "actual" possession of, settled real estate do not vest absolutely in a tenant in tail of the real estate who dies in the lifetime of the tenant for life.—*Lord Scarsdale* v. *Curzon* (1 J. & H. 40) considered and applied. *In re* Angerstein. Angerstein *v.* Angerstein - - - - - 883

5. —— *"Issue" living—Child en ventre sa Mère.*] Devise to A. for life, and upon her death to B. "for her absolute use and benefit in case she has issue living at the death of" A., "but in case she has no issue then living" then over.—At the time of the death of A., who survived the testator, B. was enceinte, and the following day was delivered of a living child:—*Held*, that B. took absolutely.—Dictum of Lord Eldon in *Thellusson* v. *Woodford* (11 Ves. 112, 149), commenting on the case of *Gulliver* v. *Wickett* (1 Wils. 105), discussed and followed. *In re* Burrows. Cleghorn *v.* Burrows - - - - 497

6. —— *Married Woman—Married Women's*

WILL—*continued.*

Property Act, 1893 (56 & 57 *Vict. c.* 63), *s.* 3—*Wills Act*, 1837 (1 *Vict. c.* 26), *s.* 24.] Sect. 3 of the Married Women's Property Act, 1893, applies to every will of a married woman who dies after the date of the Act. *In re* WYLIE. WYLIE *v.* MOFFAT - - - - - 116

7. —— *Marshalling—Residuary Gift—Charity—Exception of Impure Personalty—Intestacy.*] A testatrix bequeathed her personal estate to trustees upon trust for sale, and out of the proceeds to pay her testamentary expenses and debts, and then to pay a legacy to her niece; and the residue of her personal estate, save and except such parts thereof as could not by law be appropriated by will to charitable purposes, she bequeathed to a charity:—*Held*, that the residuary bequest did not operate as a direction to marshal the assets in favour of the charity, but that the personal estate, after payment of the testamentary expenses and debts and the legacy out of the pure and impure personalty rateably, passed, as to so much of the residue as consisted of impure personalty, to the next of kin as undisposed of. *In re* SOMERS-COCKS. WEGG-PROSSER *v.* WEGG-PROSSER [449

8. —— *Misdescription—Specific Gift.*] A testator gave to each of his two nephews "500*l.* debenture stock or shares of the S. Company," to each of his three cousins "350 ordinary shares in the S. Company," to J. L. M. "250 fully-paid shares in the said company," and to C. "50 shares in the said company." He then gave "the pecuniary legacies following," giving a list of them. He then bequeathed to his trustees "5000*l.* debenture stock or shares of the S. Company, 350 ordinary shares in the same company, 1500*l.* debenture stock or shares in the B. Company, and 35 shares in the D. & H. Railway Company, upon trust to continue the same in their present state of investment," or to sell them and invest the proceeds, and to stand possessed of the said stocks and shares and the proceeds of sale and the investments representing the same upon the trusts therein mentioned. He gave his residuary estate to his trustees upon trust to convert it into money and pay his funeral and testamentary expenses and debts, and "pay or provide for the payment of the pecuniary legacies and sums hereinbefore bequeathed." And he declared that his trustees might postpone the conversion of his debentures or shares in the S. Company, or any other part of his personal estate, so long as they thought fit. The testator had debentures and ordinary shares in the S. Company and debentures in the B. Company. There was not in either company any debenture stock, nor any shares other than ordinary shares:—*Held*, by Kekewich J., that the legacies were all general, and that the gifts of "debenture stock or shares" were invalid as being gifts of something which did not exist:—*Held*, on appeal, that by "debenture stock or shares" the testator intended to describe something different from ordinary shares, but as to the proper designation of which he was in doubt, and must be taken to have meant debentures:—*Held*, further, that the gift of 5000*l.* debenture stock or shares was clearly specific, as the testator spoke of its "present state of investment"; and that, looking at this and the other indications in the will that he was dealing with property which he had, the legacies of stock and shares must all be taken to be specific. *In re* NOTTAGE. JONES *v.* PALMER (No. 2) C. A. 657

9. —— *Precatory trust—"I wish them to bequeath the same."*] A testatrix gave legacies to her two nieces for their separate use, and added, "I wish them to bequeath the same equally between the families of O. and P.":—*Held* (affirming the decision of Kekewich J.), that the legacies were given absolutely to the two nieces of the testatrix, and that there was no precatory trust for the families of O. and P.—In considering whether a precatory trust is attached to any legacy, the Court will be guided by the intention of the testator apparent in the will, and not by any particular words in which the wishes of the testator are expressed.—*Malim* v. *Keighley* (2 Ves. 333, 529 *a*) not followed.—*In re Adams and Kensington Vestry* (27 Ch. D. 394) and *In re Diggles* (39 Ch. D. 253) followed. *In re* HAMILTON. TRENCH *v.* HAMILTON - - - C. A. 370

10. —— *Remoteness—Gift to Class—Proviso for Settlement of Shares—Invalidity as to some Members of Class—Divisibility of Proviso.*] A testator gave his residuary estate in trust, after the death of M. and her husband, for all the daughters of M. who should attain twenty-one or marry under that age; with a proviso that the share of any daughter should be held upon trust for her for life, and after her death upon similar trusts for her children as were thereinbefore declared for the children of M. M. had one daughter only, the plaintiff, who attained twenty-one, and she was born in the lifetime of the testator:—*Held* (affirming the decision of Chitty J.), that the proviso for resettlement of the shares must be construed as applicable to each share separately; and that although it would have been void for remoteness in the case of daughters born after the death of the testator, it was valid in the case of the plaintiff, and therefore she was only entitled to a life interest in the fund. *In re* RUSSELL. DORRELL *v.* DORRELL - - - C. A. 698

11. —— *Revocation by Codicil of Gift in Will—Annuity—Decision as to Future Interests.*] A testator by his will gave to his granddaughter A. an annuity of 300*l.*, to be a charge on certain land, and after her death he directed that "the said sum of 300*l.*" should be raised and paid unto and amongst her children as she should by deed or will appoint, and in default of appointment amongst her children equally during their respective lives. He devised to his granddaughter B. a like annuity of 300*l.*, to be a charge on the same property, "and to be paid to her and her children in the same manner in all respects as the annuity hereinbefore given to my granddaughter A." By a codicil reciting that the testator had by his will given an annuity of 300*l.* to each of the two granddaughters he revoked the gifts "of the said annuities," and in lieu thereof gave to each of his said granddaughters A. and B. an annuity of 150*l.*, to be payable and charged in the same manner and on the same hereditaments as the several annuities of 300*l.* were by the will made payable and charged. The children

WILL—*continued.*

of A. and B. were not referred to in the codicil: —*Held* (by Lindley and Lopes L.JJ., affirming the decision of Kekewich J.), that the effect of the codicil was to substitute annuities of 150*l.* to A. and B. and their respective children for the annuities of 300*l.* given by the will; dissentiente Rigby L.J., who was of opinion that the gifts of 300*l.* a year to the children of A. and B. respectively after the deaths of their respective parents were not affected by the codicil.—The Court did not refuse to decide the question on the ground that it affected the future rights of unborn children, the interests of those children being the same as those of the existing children who were before the Court. *In re* Freme's Contract [C. A. 256, 778

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—— Contingent legacy—Intermediate income *See* Infant. 1. [309

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